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IN THE

Supreme Court of the United States

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, EFRIDAH PFEBVE, ON HER OWN BEHALF AND ON BEHALF OF HER LATE BROTHER METTHEW PFEBVE, ELLIOT PFEBVE, ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHER METTHEW PFEBVE, EVELYN MASAITI, ON HER OWN BEHALF, MARIA DEL CARMEN STEVENS, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND DAVID YENDALL STEVENS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held—in conflict with precedent from this Court and other courts of appeals—that the United States government had standing to appeal a final judgment that did not bind the government and where the government's interest was in a procedural ruling on which the judgment was based, not in the judgment itself?

2. Whether the Second Circuit correctly interpreted the scope of immunity provided under the Convention on Privileges and Immunities of the United Nations when the court ignored the plain language of the treaty, its structure, and its specificity—contrary to this Court's precedents on proper treaty interpretation?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

[1] For purposes of recusal, counsel for petitioners states that Hogan & Hartson L.L.P. began representing petitioners in this matter in April 2001.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 386 F.3d 205 and is reproduced at 1a of the appendix to this petition ("App."). The denial of the petition for rehearing and rehearing *en banc* is reproduced at App. 217a. The decision and order of the District Court granting a default judgment against ZANU-PF and denying entry of a default judgment against defendants Robert Mugabe and Stan Mudenge is reported at 169 F. Supp. 2d 259 and is reproduced at App. 121a. The decision and order of the District Court denying the United States government's motion for reconsideration and granting its motion to intervene for the limited purpose of appealing the judgment is reported at 186 F. Supp. 2d 383 and is reproduced at App. 97a. The decision and order of the District Court awarding damages to petitioners is reported at 234 F. Supp. 2d 401 and is reproduced at App. 29a.

JURISDICTION

The judgment of the Second Circuit was entered on October 6, 2004. App. 1a. Petitioners' timely petition for rehearing or rehearing en banc was denied on August 30, 2005. App. 217a. On November 18, 2005, Justice Ginsburg extended the time within which to file a petition for certiorari to and including January 12, 2006. App. 219a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutes are set forth at App. 221a.

INTRODUCTION

Petitioners are individuals and their survivors who were subjected to abuse, torture, and execution by Zimbabwe's sole governing political party, the Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), President Robert Mugabe, a ZANU-PF official who has ruled Zimbabwe since its independence in 1980, and Stan Mudenge, a ZANU-PF official. As the United States Department of State has consistently recognized, Mugabe and ZANU-PF have maintained their grip on the country by intimidating and suppressing all opposition through torture, murder, and

politically motivated disappearances.[2] Petitioners sought redress for these well-documented human rights abuses under the Alien Tort Statute ("ATS") and the Torture Victim Protection Act ("TVPA"). Although they were served with process, neither Mugabe nor Mudenge nor ZANU-PF entered an appearance in the District Court. While petitioners' motion for default judgment was pending, the United States government filed a Suggestion of Immunity for Mugabe and Mudenge. And when default judgment was entered against ZANU-PF, a non-immune private entity, the United States government sought to intervene to appeal that judgment.

Contrary to this Court's precedent and decisions of other courts of appeals, the Second Circuit rejected petitioners' argument that the government lacked appellate standing and that the immunity provided to temporary U.N. representatives did not protect Mugabe and Mudenge from service of process as ZANU-PF agents. The panel first disregarded this Court's decisions on Article III standing and allowed the government—a non-party—to appeal a final judgment on the sole basis that the District Court had failed to adopt the government's proffered treaty interpretation. The panel then resolved the treaty issue by adopting the government's interpretation—even though doing so meant ignoring the plain meaning of the treaty and violating well-established principles of statutory interpretation. This Court should grant certiorari to resolve the multiple conflicts on the important and recurring questions presented.

STATEMENT OF THE CASE

During the lead-up to Zimbabwe's parliamentary elections in 2000, ZANU-PF conducted an organized campaign of terror and violence to suppress the Movement for Democratic Change ("MDC"), a burgeoning but peaceful political

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[2] *See, e.g.*, United States Department of State Country Reports on Human Rights Practices, Zimbabwe, 2000 (Feb. 23, 2001), available at http://www.state.gov/g/drl/rls/hrrpt/2000/af/852.htm; United States Department of State Country Reports on Human Rights Practices, Zimbabwe, 2004 (Feb. 28, 2005), available at http://www.state.gov/g/drl/rls/hrrpt/2004/41634.htm.

opposition party. Petitioners and their families were among those who were murdered and tortured by ZANU-PF. App. 3a. It is impossible to catalog all the atrocities that ZANU-PF committed during this reign of political terror. Yet those waged against petitioners were among the most egregious. ZANU-PF ambushed and killed petitioner Adella Tachiona's husband as he was campaigning for an MDC candidate—beating him, dousing him with gasoline, and setting him on fire. He died on the spot. App. 57a-58a. ZANU-PF also kidnapped, beat, and murdered the brother of petitioners Efridah and Elliot Pfebve. It went on to kidnap and beat their father. App. 59a. And it repeatedly attempted to assassinate petitioner Elliot Pfebve for his role as an MDC candidate for Parliament. To intimidate petitioner Evelyn Masaiti, who was running for a parliamentary seat for the MDC, ZANU-PF destroyed her home, burning it to the ground. And finally, ZANU-PF kidnapped, tortured, and severely beat petitioner Maria Del Carmen Stevens's husband, an MDC supporter, forcing him to drink diesel oil before ultimately executing him. App. 58a-59a.

A. District Court Proceedings.

1. On September 6, 2000, petitioners filed suit in the United States District Court for the Southern District of New York, naming as defendants ZANU-PF, Mugabe (the President and First Secretary of ZANU-PF and the President of Zimbabwe), and Mudenge (a senior ZANU-PF official and Minister of Foreign Affairs for Zimbabwe). The complaint set forth seven causes of action against the defendants for violations of the ATS, 28 U.S.C. § 1350, the TVPA, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), and norms of international human rights law.

Petitioners served Mugabe with two copies of the complaint on September 7, 2000—one in his personal capacity and one in his capacity as an agent for ZANU-PF. The specific details of the service of process are crucial to the immunity issues here. Mugabe had come to New York City as a temporary representative to the United Nations for the Millennium Summit. App. 3a. But in addition to—and

wholly separate from—attending the summit, Mugabe also chose to appear at a political rally for ZANU-PF. The rally was organized by a private New York group that politically and financially supports ZANU-PF under the name "Friends of the ZANU-PF." This private entity had nothing to do with the United Nations or the United States government. App. 3a. Nor was this rally held on property belonging to a sovereign or the United Nations. To the contrary, it was held at the Mt. Olivet Baptist Church in Harlem, New York. And instead of facilitating any official diplomatic work, the rally was designed to galvanize political support for ZANU-PF and its policies and to lobby the American public against pending legislation that condemned ZANU-PF's well-documented campaign of violence. App. 3a, 128a.[3] As Mugabe entered the church where the rally was being held, he was served with and accepted two copies of the complaint.

Mudenge was served with a copy of the complaint the next day outside the Zimbabwe Mission building. When none of the served defendants entered an appearance in the District Court, plaintiffs moved for default judgment.

2. Nearly six months after Mugabe, Mudenge, and ZANU-PF had been served—and while plaintiffs' motion for default judgment was pending—the United States government submitted a Suggestion of Immunity to the District Court, citing 28 U.S.C. § 517. App. 128a. The government argued that Mugabe and Mudenge were entitled to head-of-state immunity and to diplomatic immunity under Section 11 of the Convention on Privileges and Immunities of the United Nations ("U.N. Convention")[4] and Article 31 of the Vienna Convention on Diplomatic Relations ("Vienna Convention").[5] The government also offered its advice that Mugabe and Mudenge should be immune from service of

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[3] Congress later in fact enacted the legislation as the Zimbabwe Democracy Act of 2000, S. 2677, 106th Cong. (2000).

[4] *Adopted* Feb. 13, 1946, *United States accession*, April 29, 1970, 21 U.S.T. 1418 (1970).

[5] *Adopted* Apr. 18, 1961, *United States accession*, Dec. 13, 1972, 23 U.S.T. 3227 (1972).

process as agents for ZANU-PF because Section 11 of the U.N. Convention and Article 29 of the Vienna Convention grant them "personal inviolability." The government did not seek to intervene as a party, but instead expressly limited its participation to "non-party" status.

3. On October 30, 2001, the District Court issued its first decision on the immunity issues. App. 121a-216a. It accepted the government's Suggestion of Immunity as to Mugabe and Mudenge in their individual capacities, finding that they enjoyed head-of-state immunity and diplomatic immunity under Section 11 of the U.N. Convention. App. 184a-188a. It also found that they had "full diplomatic inviolability." App. 187a. But the District Court held that the immunity from suit that Mugabe and Mudenge enjoyed in their personal capacities did not immunize them from *service of process* in their capacity as senior party officials for ZANU-PF—an entity that plainly has no entitlement to diplomatic immunity.

In reaching this result, the court rejected the government's view that diplomatic immunity and absolute inviolability rendered Mugabe and Mudenge immune from service of process on a non-immune private entity like ZANU-PF. App. 193a-197a. The District Court granted judicial deference to the Suggestion of Immunity by the government for Mugabe and Mudenge, but it distinguished immunity from inviolability. When it comes to *that* inquiry, the District Court properly held that no legal doctrine or precedent confers on the government the function of defining inviolability. App. 192a-193a. Indeed, the government's Suggestion of Immunity never purported to assert that ZANU-PF was entitled to invoke any form of immunity. App. 190a-192a. But as the court recognized, accepting the government's inviolability theory would indirectly achieve that result; it would effectively grant ZANU-PF immunity to which it was not entitled under the cover of Mugabe's and Mudenge's diplomatic immunity. *Id.*

The court was "not persuaded" that the immunity doctrine "reaches to the outer bounds the Government advances as

regards Plaintiffs' action against ZANU-PF." App. 192a. The court found "uncompelling" the government's contention that the court was required "to give conclusive effect to the State Department's advice with regard to the appropriateness of service of process" on ZANU-PF. App. 193a. That is because service of process effected on ZANU-PF would not constitute an affront to the person or dignity of the ruler or the foreign state—the rationales underlying inviolability for foreign rulers. App. 195a-198a. Only a private party—ZANU-PF—and not Mugabe or Mudenge would be called to answer the service of process. App. 193a-194a. And the court recognized the "growing acceptance for a rule of law that reaffirms that no person is above the law"—so that when foreign government officials engage in private conduct through a private organization, they cannot cloak that organization with their official immunity. App. 199a. It found this rule of law especially applicable here, where the "service of process [was] intended to challenge the wrongful actions of the particular organization with which [the individual officials] are closely associated and whose bidding they were doing at the time of service." App. 195a. Allowing service of process would make clear that when foreign rulers engage in private activities, their shield of inviolability does not sweep in those private activities with the public ones. The court accordingly granted the motion for entry of a default judgment against ZANU-PF. App. 216a.

4. The government sought reconsideration of the ruling that process on ZANU-PF had been effectuated through personal service on Mugabe and Mudenge, and it sought to intervene pursuant to Fed. R. Civ. P. 24 solely for the purpose of appealing this issue. App. 98a-99a. The government's only basis for seeking reconsideration was to fault the court for not deferring completely to the executive branch's treaty interpretation. App. 100a. The court denied reconsideration. It noted that it had in fact followed the Suggestion of Immunity, but had parted ways with the government's further "advice" about service on ZANU-PF; this "advice" was not entitled to the same degree of deference as the immunity suggestion. App. 102a; *see* App. 113a (finding "troubling"

the government's "umbrage with the Court's disagreement with its 'advice' "). The court rejected the government's demand for blind obedience, explaining that if it accepted the government's argument, "the Court's constitutional role and discretion in treaty interpretation would effectively be reduced to that of a mere echo of the Government's position." App. 113a. As the District Court emphasized, to abdicate judicial independence as the government urged—and thereby reduce the court's role to one of "obeisance" and "toe[ing] the official line"—would "make[] a mockery of constitutional separation of powers." *Id.*

The District Court granted the government's request to intervene "for the limited purpose of appeal." App. 120a. Petitioners argued that the government lacked standing to appeal, but the court never analyzed this issue.

5. A damages hearing was held before a magistrate judge, in which several petitioners risked their lives to testify about the injuries they and their families suffered. Ultimately, the District Court affirmed the magistrate judge's report and recommendation as to the award of damages and held ZANU-PF liable for $20,250,453 in compensatory damages and $51,000,000 in punitive damages, for total damages of $71,250,453.00. App. 94a-95a.

B. Court Of Appeals Proceedings.

Although the judgment issued against ZANU-PF—not the government—the government sought to appeal because it disagreed with the District Court's service of process ruling. The Court of Appeals affirmed the dismissal of petitioners' claims against Mugabe and Mudenge, but it reversed the District Court's default judgment entered against ZANU-PF.

1. Standing. The Second Circuit first addressed whether the government possessed Article III standing to pursue an appeal. App. 4a-7a. After all, the only party bound by the judgment below—ZANU-PF—had not appealed. As the court recognized, "it is well established that a party not bound by a judgment cannot appeal a district court's decision on the sole ground that the decision sets a precedent unfavorable to the would-be appellant" and that "a party not bound

by a judgment will, in the usual case, have difficulty showing that it meets the Article III standing requirements." App. 6a-7a (citing *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632, 633 (1944) and *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66 (1997)). The reason for this: "such parties normally will not have sustained a 'legal injury, actual or threatened' as a result of the judgment." App. 7a (citing *Edward Hines Yellow Pine Trs.* v. *United States*, 263 U.S. 143, 148 (1923)).

The Second Circuit admitted that petitioners' arguments against the government having standing were "not without some force." App. 6a. But the panel nonetheless accepted the government's position that the District Court's judgment had caused two injuries to the government: (1) placing it in violation of certain international treaties, and (2) usurping the executive branch's exclusive authority "to conduct foreign affairs and to send and receive ambassadors." App. 7a.

2. Immunity. On the merits, the panel had to determine whether diplomatic immunity shielded Mugabe and Mudenge from service of process as agents of ZANU-PF. To answer that question, the court first examined the extent to which diplomatic immunity applied to Mugabe and Mudenge. This required examining Section 11 of the U.N. Convention—which provides temporary representatives certain immunities "while exercising their functions and during their journey to and from the place of meeting." U.N. Convention, art. IV, § 11.

Section 11(a) is the only place the U.N. Convention expressly addresses immunity from legal process. It states that there is immunity for legal process as to "all acts done by [representatives] in their capacity as representatives." U.N. Convention, art. IV, § 11(a). The panel acknowledged that "[s]tanding alone, section 11(a) would not protect Mugabe and Mudenge from suit based on acts of violence they perpetrated in Zimbabwe, because such acts are not 'acts done by them in their capacity as representatives.' " App. 13a. But instead of stopping there, the court turned to the catch-all provision in Section 11(g), which provides for

"such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy * * *." *Id.* The panel found that Section 11(g) incorporated Article 31 of the Vienna Convention—which "provides for a much more robust form of immunity from legal process than that afforded by section 11(a)." App. 13a.

The panel rejected petitioners' argument against reading Section 11(g)'s generalized scope as overriding and effectively expanding Section 11(a)'s narrow and particularized provision. App. 14a-15a. Instead, the panel found Section 11 "ambiguous," App. 15a, and resorted to interpretive tools to determine the interplay between Sections 11(a) and (g). The panel declined to follow the interpretive tools that petitioners suggested—the plain language of the text, its structure, and its specificity—and relied instead on a hodgepodge of congressional records that post-dated by two decades Section 11's drafting and adoption by the United Nations. And to bolster this extrinsic-evidence gloss, the panel focused on a stray statement from former U.N. Secretary-General Kurt Waldheim. App. 18a-19a. Finally, the court read Section 11's prefatory language—limiting immunity to those times when representatives are "exercising their functions and during their journey to and from the place of meeting"—so broadly that it covered Mugabe's attendance of a private political rally miles away from and unrelated to his duties as a U.N. representative. App. 19a-20a.[6]

The panel addressed the District Court's ruling on service of process for ZANU-PF by finding that Section 11(g) also incorporates the "inviolability" of a diplomatic agent from Article 29 of the Vienna Convention. App. 24a. The panel disagreed with the District Court's conclusion that "inviolability" did not protect Mugabe and Mudenge from service of process as *agents* for ZANU-PF. It found that "as a practical matter, service of process on a person entitled to diplomatic immunity both interferes with that person's representative

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[6] In light of its ruling on diplomatic immunity, the Court of Appeals did not address the application of head-of-state immunity to Mugabe and Mudenge. App. 23a.

functions and constitutes an affront to his or her dignity." App. 28a. Therefore, it held that Article 29 applied to Mugabe and Mudenge through Section 11(g) of the U.N. Convention and shielded them from service of process as ZANU-PF agents. Therefore, the court held that ZANU-PF was not properly served and the claims against it should have been dismissed. App. 28a-29a.

A petition for rehearing and rehearing *en banc* was filed November 19, 2004 and denied August 30, 2005. App. 218a.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S STANDING DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS ON AN IMPORTANT AND RECURRING QUESTION OF FEDERAL JURISDICTION.

It is well-established that "[t]he standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English*, 520 U.S. at 64. The standing inquiry is somewhat different on appeal than it is for plaintiffs in the first instance: a plaintiff in the district court must show injury caused by specific *facts* that the plaintiff seeks to redress through its lawsuit; an appellant seeking to confer jurisdiction on an appellate court must demonstrate "injury caused by the *judgment* rather than injury caused by the underlying facts." 15A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3902, at 63 (2d ed. 1992) (emphasis added).

In this case, the Second Circuit held that the government had standing to appeal the service of process ruling because it "placed the United States in violation of certain international treaties," and it "usurped" the executive branch's constitutional authority. App. 7a. Yet to find standing based on these putative injuries—as the Second Circuit did—would squarely conflict with this Court's established precedents. Moreover, the only other possible injury stemming from finding valid service of process that the government has articulated is the interest in avoiding undesirable precedent.

That interest, this Court has made clear, is not enough to establish appellate standing.

The Second Circuit's holding that the government has appellate standing decides "an important federal question" that directly conflicts with the decisions of this Court and that "should be settled by this Court." S. Ct. Rule 10(a), (c). The question is important for two reasons. *First*, its resolution has broad implications for the role of the Executive in lawsuits involving foreign sovereigns and diplomatic immunity, especially in TVPA cases involving state-sponsored torture or murder. This case will determine whether the Executive is bound by established appellate standing rules in these cases and can intervene despite its lack of a concrete, particularized injury. *Second*, this case will help to clarify the circumstances in which intervenors can establish appellate standing despite lacking any personal stake in a dispute's final outcome. Indeed, the panel's decision is an unprecedented development in Article III standing jurisprudence: we are not aware of any other case allowing an intervenor to appeal where its only interest was to contest a lower court judgment that is non-binding and non-preclusive to the intervenor, and where the intervenor admitted being indifferent to the actual judgment. Given the importance of requiring Article III standing to proceed in federal court, this Court should review the decision below.

The Second Circuit's standing decision appears to conflict with prior decisions both from this Court and from other circuits, in at least three different ways. We address each conflict below.

A. The Second Circuit's Acceptance Of The Government's Proffered Interests As Sufficient For Standing Conflicts With This Court's Precedent.

The two "legally protected interests" on which the panel relied in finding the government had standing contradict this Court's prior holdings on Article III standing.

1. The Second Circuit held that the government had standing to appeal based on its assertion that the service of process ruling "placed the United States in violation of certain

international treaties." App. 7a. The panel read into the Executive's power "to make Treaties" an implicit "corollary" obligation "to ensure that the United States complies with them." *Id.* As evidence of the obligation to ensure compliance with treaties, the panel cited cases in which the Executive had filed suit to enjoin a treaty violation by a private party. App. 8a. Based on these cases, the court held that the power to ensure compliance with a treaty encompasses the power to appeal a judicial interpretation of a treaty if the Executive disagrees with it—even in cases between private litigants where the losing party chooses not to appeal.

That expansive rule squarely conflicts with the established precedents of this Court holding that it is the responsibility of the *judiciary* to interpret treaties, just as it is the judiciary that must interpret all of the other laws of the land.[7] Because it is the judiciary's role to interpret treaties, it makes no sense to view the Executive as suffering an injury-in-fact any time a court adopts a treaty interpretation that differs from the Executive's preferred interpretation. Indeed, this Court has often *rejected* the Executive's interpretation of a treaty. *See, e.g., Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (Warsaw Convention); *Perkins* v. *Elg*, 307 U.S. 325 (1939) (Naturalization Convention); *Johnson* v. *Browne*, 205 U.S. 309 (1907) (extradition treaty). Yet under the Second Circuit's new rule, every time a court disagrees with a treaty interpretation proffered by the Executive, the government suffers a cognizable injury sufficient for appellate standing—even if the party allegedly harmed by the treaty violation does not voice any injury. This result completely upends the

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[7] *See, e.g., Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982) (while government's treaty interpretation entitled to weight, it is "not conclusive"); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961) ("courts interpret treaties for themselves"). More generally, the Supremacy Clause makes "all Treaties," along with the Constitution and statutes of the United States, "the supreme Law of the Land." U.S. Const. art. VI, § 1, cl. 2. Chief Justice Marshall made clear long ago that the federal courts are responsible for adjudicating that "Law." *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

established understanding of the judiciary's independent role in interpreting the law of the land—including treaties.

Moreover, the only cases relied on by the Second Circuit involved treaty violations caused by the actions of *private parties*, rather than by a court decision. App. 8a. This, according to the Second Circuit, "is a distinction without a difference." *Id.* Not so. The judiciary is not remotely like a garden-variety private party; it is the branch of government constitutionally charged with interpreting treaties.

2. The Second Circuit held that the government had standing to appeal because the finding of valid service of process on ZANU-PF "usurped the executive branch's constitutional authority to conduct foreign affairs and to send and receive ambassadors." App. 7a. This holding directly conflicts with the Court's decision in *Raines* v. *Byrd*, 521 U.S. 811 (1997).

In *Raines*, this Court held that members of Congress lacked standing to sue to challenge the constitutionality of the Line Item Veto Act. Congress had specifically authorized individual members of Congress to challenge the constitutionality of the Act, and they argued that the Act "unconstitutionally expands the President's power" by usurping the constitutional authority of Congress to pass laws for the President's signature or veto. *Id.* at 815-816. The Court held that this claim of "institutional injury" was related solely to the alleged "loss of political power" on the part of Congress and was insufficient to satisfy Article III. *Id.* at 821. Based on "historical practice," the Court concluded that federal courts could not have properly heard disputes brought by the executive or legislative branches claiming that their constitutional authority had been usurped by an act of one of the other branches of government, a principle which also applied to the Line Item Veto Act. *Id.* at 826-829.

As in *Raines*, the institutional injury alleged by the government here is too abstract to support Article III standing. The Second Circuit read *Raines* as limited to constitutional disputes between the executive and legislative branches and therefore inapplicable when judicial action is involved. App. 9a-11a. Nothing in *Raines* establishes this limitation.

Indeed, while *Raines* recognized the unique posture of the dispute in that case, 521 U.S. at 819-820, the Court's actual holding was that the "individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing." *Id.* at 830. In other words, the Court applied its traditional injury-in-fact requirement, rather than a test uniquely tailored to disputes between the executive and legislative branches. The limitation on abstract institutional injuries from *Raines* is not rendered inapplicable here merely because the government's alleged injury was caused by the judiciary. The fact remains that, as in *Raines*, the government alleged only an abstract harm to the Executive's institutional power.

And just as the Court observed that allowing the *Raines* plaintiffs to seek judicial redress for an institutional injury would be "contrary to historical experience," the same is true of the government's position in this case. *Id.* at 829. There is no historical practice of allowing the Executive to intervene in cases where the government is not a party solely to appeal a judgment that it claims "usurps" its constitutional authority. If that were possible, Congress could intervene to appeal in almost any lawsuit in which a court interpreted a federal statute contrary to Congress's liking; Congress could simply argue that the court so far "overstepped its bounds" as to "usurp" Congress's lawmaking function, giving Congress standing to appeal even if no private litigant does. Similarly, if the Second Circuit is right, then the Executive can also intervene and file an appeal in any private lawsuit that touches upon any of the Executive's constitutional powers—a lower court's failure to defer could always be termed "usurpation" sufficient to confer standing to appeal.

The Second Circuit also attempted to distinguish *Raines* on the basis that the Executive's interest here is "not abstract" because "the direct effect of the district court's ruling would be to permit service of process" upon ZANU-PF through Mugabe and Mudenge. App. 10a. Yet this distinction erroneously shifts focus from the alleged *injury* to the *cause* of that injury. That the cause of the government's alleged

injury may be distinct (finding valid service of process) does not answer the question whether the injury itself is concrete. In *Raines*, the cause of the injury to members of Congress was distinct—passage of the Line Item Veto Act—but their alleged injury—dilution of their institutional power—was too abstract to support standing.

In any event, *Raines* has never been read as narrowly as the Second Circuit did below. Even the government has read *Raines* more broadly. For example, in arguing to this Court that the House of Representatives lacked standing to challenge the President's implementation of the census laws, the Solicitor General cited *Raines* for the proposition that "the 'institutional' injury alleged by the House of Representatives" is an inadequate basis for invoking Article III jurisdiction because "inter-branch disputes have never been thought susceptible of judicial resolution." Brief for the United States in *United States Dep't of Commerce* v. *United States House of Representatives*, No. 98-404 (Oct. 5, 1998), at 24.

B. The Government's Only Remaining Injury Is Its Interest In Reversing Unfavorable Precedent, Which This Court Has Held To Be Insufficient To Confer Standing To Appeal.

The government's sole remaining interest in the dispute between these plaintiffs and defendants is its desire to avoid the creation of unfavorable precedent. Yet it has long been the rule of this Court that an intervenor with no direct interest in a case's final outcome lacks standing to appeal adverse precedent when the party-appellant decides not to appeal.

In *Boston Tow Boat*, this Court clearly held that an intervenor does not have standing to pursue an independent appeal when its interest in the case is independent of the judgment itself and is instead based on a disagreement with a lower court's interpretation of a legal issue. 321 U.S. at 633-634. The Boston Tow Boat Company intervened in a district court case to assert that the ICC lacked jurisdiction over tow boats. The district court upheld the ICC's jurisdiction—which was obviously harmful to Boston Tow Boat's concrete interest in resisting this finding of jurisdiction. Nevertheless, this Court

held that Boston Tow Boat did not have standing to independently appeal a judgment against another company premised on the finding of jurisdiction. *Id.* Under *Boston Tow Boat*, where an intervenor's sole interest in a final judgment is its desire to contest a harmful ruling against the separate entity—in which the intervenor has no stake—the intervenor does not have standing to appeal even though the ruling was an *express predicate* to the judgment. *Id.*

This principle has been widely followed in the circuit courts.[8] Most importantly, the First Circuit followed *Boston Tow Boat* in deciding that the government could not appeal a decision on the constitutionality of a provision in the Bankruptcy Act. *See Ruotolo* v. *Ruotolo*, 572 F.2d 336 (1st Cir. 1978). Although the *Ruotolo* court accepted that the government had a "strong interest in obtaining a ruling" on the question at hand, it held that an interest in a "dispositive ruling in this untested area" was insufficient to confer standing to appeal. *Id.* at 338-339. The Court recognized that 28 U.S.C. § 2403 granted the government "all the rights of a party" in a case involving the constitutionality of a federal statute, but nonetheless held that this was insufficient to authorize the government to appeal where the private party bound by the judgment chose not to do so.[9] *Ruotolo*, 572 F.2d at 337-338.

The government's sole remaining interest in reversing unfavorable precedent cannot support appellate standing

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[8] *See, e.g., Korczak* v. *Sedeman*, 427 F.3d 419, 421 (7th Cir. 2005) (relying on *Boston Tow Boat* to hold that intervenor lacked standing to appeal); *Shaff* v. *United States*, 695 F.2d 1138, 1140 (9th Cir. 1983) (*Boston Tow Boat* does not permit intervenor to seek review of judgment not affecting intervenor's interests); *Lynchburg Gas Co.* v. *Federal Power Comm'n*, 284 F.2d 756 (3d Cir. 1960) (affirming denial of intervention).

[9] While *Ruotolo* also involved an issue of mootness, the First Circuit's analysis focused almost entirely on the government's lack of standing to seek a ruling on the constitutionality of the statute. *Id.* at 338 (the "question of justiciability turns chiefly" on whether the government "had standing to continue to challenge" the conduct at issue).

unless the rule of *Boston Tow Boat* does not apply to the government. Just as the government asserts a vital interest in the immunity issue in this case, Boston Tow Boat had an obviously vital interest in asserting that the ICC had no jurisdiction over tow boats. And similarly, just as the government has admitted that it has no interest in whether ZANU-PF is held liable under the TVPA, Boston Tow Boat was found not to have any interest in whether the actual defendant in that case (Cornell Steamboat Company) was found to have violated the law.

To be sure, the government argued that the District Court "usurped" the Executive's constitutional authority and placed the United States "in violation" of international treaties. In substance, however, there can be no doubt that the government's interest was in the ramifications of finding valid service of process on *other* potential defendants in *other* cases, and hence on its foreign relations more generally. Before the District Court, the government admitted as much, stating that its interest was "solely" to protect its "conduct of international relations from harms that would result from any erosion of immunities afforded visiting foreign heads of state and diplomats." U.S. Gov't Mem. in Supp. Reconsideration (Nov. 16, 2001). These harms were never specified. The government admitted that the one, concrete ramification of the ruling—a judgment against the admittedly non-immune ZANU-PF—did *not* cause the government any harm. It never contended that its relations with Zimbabwe, or with any other country or government official, had been injured by the ruling. And in the District Court, the government never articulated its injury as "violation" of either a treaty or the Constitution. Instead, it simply stated that it "anticipate[d]" that the ruling would "interfere" with its conduct of foreign relations. Second Circuit Joint Appendix at 883.

The government's "anticipation" of future, unspecified "harms" that "would result from" finding valid service of process is purely an interest in the precedential effect of that decision. Of course, anytime the government seeks to reverse what it believes to be undesirable precedent, it will be able to articulate far-ranging, institutional interests—for

example, that the lower court "usurped" the Executive's constitutional authority by failing to give the full amount of deference. Certiorari is warranted to determine if merely by articulating such interests, the government can avoid the rule of *Boston Tow Boat*.

Allowing the Second Circuit's decision to stand would effectively lead to absurd results. For example, the government admitted below that if the District Court had found that plaintiffs had served ZANU-PF in some other way, rather than through Mugabe or Mudenge, then the judgment against ZANU-PF would not have caused the government any injury. U.S. Gov't Second Circuit Br. 5-6 (Sept. 29, 2003). Under the Second Circuit's rule, if the finding of valid service of process had been followed by a judgment in favor of defendants (such as for lack of proof or failure to satisfy the terms of the ATS), the government *still* would have had standing to appeal the case. The panel found that so long as the service of process ruling was in place, the government had sufficient injury-in-fact to appeal regardless of the actual outcome of the case.[10] That radical expansion of Article III standing warrants this Court's review.

II. THE SECOND CIRCUIT'S INTERPRETATION OF THE U.N. CONVENTION CONFLICTS WITH THIS COURT'S DECISIONS ON AN IMPORTANT AND RECURRING ISSUE OF INTERNATIONAL LAW.

A. The Decision Below Fails To Uphold The U.N. Convention's Plain Meaning And Ignores Applicable Principles Of Statutory Interpretation.

Nearly two centuries ago, this Court held that "where the words of a law, treaty, or contract, have a plain and obvious

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[10] Relatedly, allowing the government to appeal when the District Court followed the immunity suggestion and only disagreed with the corollary "advice" cannot be squared with this Court's conclusion that Congress enacted the Foreign Sovereign Immunities Act specifically *to end* the practice of blind judicial deference to such executive branch "suggestions." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983).

meaning, all construction, in hostility with such meaning, is excluded." *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1821). Consistent with this "maxim of law" and "dictate of common sense," *id.*, this Court has consistently held that courts must interpret treaties just as they interpret statutes—by their plain meaning, or if necessary, by employing principles of statutory interpretation. *See Medellin* v. *Dretke*, 125 S. Ct. 2088, 2103 (2005) ("To ascertain whether Article 36 [of the Vienna Convention] confers a right on individuals, we first look to the treaty's text as we would with a statute's."); *Chan*, 490 U.S. at 135. ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.") (quoting *In re The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821)); *Sumitomo*, 457 U.S. at 185 (absent "extraordinarily strong contrary evidence," the plain language of the treaty governs); *see also United States* v. *Stuart*, 489 U.S. 353, 371-373 (1989) (Scalia, J., concurring); *id.* at 370 (Kennedy, J., concurring in part and concurring in judgment). This is so even when the plain meaning or the principles of statutory construction lead to an interpretation that departs from the Executive's preferred interpretation.

The decision below cannot be reconciled with this Court's established precedents. The panel adopted the Executive's treaty interpretation even though that interpretation directly contradicted the plain meaning of Section 11 and violated established principles of statutory construction. But treaty interpretation—like the interpretation of any law—is the province of the Judiciary, not the Executive. *See, supra*, n.7.

Section 11 of the U.N. Convention spells out the immunities afforded temporary representatives who visit the United States for a U.N. conference. The plain text of Section 11 specifies the precise scope of immunity available:

> Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, *while exercising their func-*

tions and during their journey to and from the place of meeting, enjoy the following privileges and immunities:

a. immunity from personal arrest or detention and from seizure of their personal baggage, and, *in respect of* words spoken or written and *all acts done by them in their capacity as representatives, immunity from legal process of every kind*; * * *

g. *such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy* * * *. [U.N. Convention, art. IV, § 11 (emphases added)].

The Second Circuit agreed that the language of Section 11(a) does not provide Mugabe or Mudenge with immunity from the plaintiffs' suit because the suit is not based on their actions in their capacity as representatives. App. 13a. Nevertheless, the Second Circuit held that Section 11(g) extends to Mugabe and Mudenge the full range of immunity that diplomats enjoy under the "inviolability" principal of Article 29 and the legal process principle of Article 31 of the Vienna Convention.[11] It found Section 11(g) therefore immunizes them from being served as agents for ZANU-PF while attending a private political rally to benefit ZANU-PF—even though the purpose of such service was to obtain jurisdiction over ZANU-PF, a non-immune private entity. App. 23a. This interpretation renders the more *limited* immunity from legal process set forth in Section 11(a) totally meaningless. And it contradicts this Court's established precedents by not giving effect to the plain meaning of the treaty and by violating applicable principles of statutory construction.

1. The plain language of Section 11(a) specifically provides that Mugabe and Mudenge enjoy immunity from legal

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[11] Under Article 29, "[t]he person of a diplomatic agent shall be inviolable," and "[t]he receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." Vienna Convention, art. 29.

Under Article 31, a diplomatic agent enjoys immunity from "civil and administrative jurisdiction" except in certain circumstances. Vienna Convention, art. 31.

process *only* for acts taken "in their capacity as representatives" and "while exercising their functions in relation to U.N. meetings and during their journey to and from the place of meeting." U.N. Convention, art. IV, § 11(a). When treaty language is clear and unambiguous—as the language of Section 11(a) is—the analysis ends there. The Court applies the words of the treaty as written. *See United States* v. *Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."); *Air France* v. *Saks*, 470 U.S. 392, 397 (1985) (stating that treaty "analysis must begin, however, with the text of the treaty and the context in which the written words are used"); *see also Chan*, 490 U.S. at 135; *Sumitomo*, 457 U.S. at 185; *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 11 (1936). The U.N. Convention's plain language in Section 11(a) must control the scope of immunity from service of process.

2. Traditional canons of statutory interpretation confirm the accuracy of this plain-meaning interpretation. *See Medellin*, 125 S. Ct. at 2103 (treaty interpretation follows maxims of statutory interpretation). *First*, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' " *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citations omitted). That, however, is the exact result of the decision below. The court read Section 11(g) as overriding the limited immunity of Section 11(a) and incorporating the full extent of the absolute immunity afforded accredited diplomats. This nullifies the limitations set forth in Section 11(a), rendering that subsection completely superfluous and meaningless.[12] *See Duncan* v. *Walker*, 533 U.S. 167, 173 (2001) (noting that courts should not treat statutory terms as "surplusage"). Instead, the court was required to uphold Section 11(a)'s clear limitation on legal-

[12] The panel conceded that "[s]tanding alone, section 11(a) would not protect Mugabe and Mudenge from suit." App. 13a.

process immunity—limiting that immunity to acts done by representatives in their representative capacity.[13]

Second, it is well-established that where a statutory text lists a number of items, the specific qualifications in one provision cannot be overridden by a general catch-all clause. *See Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996) ("This Court has understood the present canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision."); *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981) (noting the "basic principle of statutory construction that a specific statute * * * controls over a general provision * * * particularly when the two are interrelated and closely positioned"). Obviously, Section 11(a) is a specific clause related to service of process while Section 11(g) is a catch-all clause related to other privileges and immunities not mentioned in the previous six subsections. Therefore, "the general language of the catchall phrase * * * must obviously give way to specific express provisions in the [treaty]." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 n.6 (1980); *see also South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 348 (1998). The panel's contrary reading was improper.[14]

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[13] The statute's prefatory language reinforces the operative limitation in Section 11(a) by limiting immunity to only certain times: during the exercise of temporary representatives' functions and during their journey to and from the meeting. As in statutory interpretation, courts cannot ignore prefatory language. *See Sepulveda* v. *United States*, 330 F.3d 55, 64 (1st Cir. 2003); *Silveira* v. *Lockyer*, 312 F.3d 1052, 1068-69 (9th Cir. 2003); *In re Paschen*, 296 F.3d 1203, 1207 (11th Cir. 2002).

[14] This is especially true because another section of the U.N. Convention provides certain officials with blanket immunity equivalent to that enjoyed by accredited diplomats under the Vienna Convention. *See* U.N. Convention, art. V, § 19 (providing blanket immunity to the Secretary-General and all Assistant Secretaries-General).

3. The Second Circuit recognized that petitioners' statutory-construction arguments were "not without force," but nonetheless rejected those arguments and adopted an interpretation that nullifies Section 11(a). In a departure from any treaty interpretation sanctioned by this Court, the panel instead decided that "the understandings of the treaty signatories and the views of the executive branch [were] at least as important" in determining the treaty's meaning. App. 16a. Based on this (mis)interpretation, the panel found Section 11(g) was intended to incorporate Articles 29 and 31 of the Vienna Convention. This Court made clear in *Sumitomo*, however, that deference to treaty signatories' purportedly shared interpretation is due only if that shared interpretation flows from plain language in the treaty itself. 457 U.S. at 185 ("When the parties to a treaty both agree as to the meaning of a treaty provision, *and* that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.").

The panel's decision cannot be reconciled with the plain meaning of the provision or the applicable principles of statutory construction. Section 11(a) must mean something. At an absolute minimum, its limitation must mean that Mugabe and Mudenge were not immune from service of process on ZANU-PF in a suit having nothing to do with their official acts as U.N. representatives. The panel's emboldened dive into "intent" in the face of contrary plain language—standing alone—warrants a grant of certiorari.[15]

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[15] The decision below also conflicts with the established rules of treaty interpretation by equating the prefatory language of Section 11—"while exercising their functions"—with the far broader phrase "during the entire period of presence in the State * * * for reasons of the conference in question." App. 19a. The court's sole basis for its interpretation is a stray, self-serving statement made by former U.N. Secretary-General Kurt Waldheim. *Id.* And this interpretation overlooks that another provision actually does apply for the entire duration of the stay. *See* U.N. Convention, art. V, § 19 (providing immunities to the Secretary-General and all Assistant Secretaries-General "in accordance with international law"); *Restatement (Second) of Foreign Relations* §§ 75(1) and

B. The Decision Below Is An Unwarranted Expansion Of Diplomatic Immunity For Temporary Representatives To The United Nations.

It is well-established that courts should tread cautiously when expanding immunity into novel situations and should only do so if the treaty at issue clearly envisions that result. "Because application of the doctrine of diplomatic immunity exempts a person from the legal procedures necessary to ordered society and often deprives others of remedies for harm they have suffered, courts hesitate to invoke the doctrine in a novel situation unless its purposes will certainly be served." *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 981 (D.C. Cir. 1965). This is especially true for claims under the ATS and the TVPA. When the ATS's and the TVPA's statutory prerequisites are met, human-rights violations like those committed by ZANU-PF are "our business," because they "not only violate[] the standards of international law but also as a consequence violate[] our domestic law." *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000).

As an unprecedented expansion of immunity for temporary U.N. representatives, this case also presents an issue of great national importance that is likely to recur in the future. Although the TVPA and the ATS were not intended to override traditional diplomatic or head-of-state immunities, Congress clearly intended to exert jurisdiction over the responsible entities and/or parties, including foreign officials since they are typically the persons capable of ordering, directing, and participating in the kind of extra-judicial violence precisely at issue in this case. Therefore, causes of action under the TVPA and the ATS will continue to intersect with the U.N. Convention in many future cases. Whether a temporary representative to the United Nations is immune from service of process when the objective of that process is to obtain jurisdiction over an otherwise non-immune private entity is a fundamental question of interna-

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80(2) (1965) (when U.N. Convention was ratified, international law extended diplomatic immunity for the entire duration of stay in the receiving state).

tional law. "The object of [this Court] granting writs of certiorari on points of statutory or treaty interpretation is to determine the correctness of fundamental points that lower courts have resolved * * *." *Chan*, 490 U.S. at 134-135.

The Second Circuit's expansion of immunity for temporary representatives to the United Nations is also at odds with the system of diplomatic immunity established by the Vienna Convention. The Vienna Convention allows the United States to accept, approve and accredit a proposed diplomat before that diplomat receives immunity, as well as to declare a diplomat *persona non grata*, at which time the person loses all immunity and must leave the country. Vienna Convention, art. 4(1), 9(1); 22 U.S.C. §§ 254 *et seq.* But no U.N. agreement grants the United States this same right. In fact, Mugabe himself has been barred from entering the United States since 2002 but continues to attend U.N. meetings in this country. And he has used these meetings as a means of evading the travel ban and attempting to draw support for ZANU-PF policies. *See, e.g.*, James Lamont, *Mugabe Defies Ban to Seek Food Summit Aid*, Fin. Times, June 9, 2002.

The unprecedented expansion of immunity for temporary representatives to the United Nations allows these representatives to directly solicit funding and support on American soil for all types of criminal activities. This undermines the purpose behind the TVPA and the ATS. The resolution of such a fundamental point of international law is an important one, warranting this Court's certiorari jurisdiction.

C. The Second Circuit's Interpretation Of "Inviolability" Conflicts With This Court's Decisions.

After concluding that Mugabe and Mudenge enjoyed full diplomatic immunity under the Vienna Convention, the Second Circuit held that the "inviolability" provided by that treaty rendered them immune even from accepting service of process on behalf of an admittedly non-immune, private entity (ZANU-PF). App. 24a. But the Second Circuit's interpretation of "inviolability" is inconsistent with this Court's decisions addressing the nature and purpose of service of process.

In *Henderson* v. *United States*, this Court explained:

> Service of process, we have come to understand, is properly regarded as a matter discrete from a court's jurisdiction to adjudicate a controversy of a particular kind, or against a particular individual or entity. * * * [T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections. [517 U.S. 654, 671-672 (1996)].

As the District Court properly recognized, the concerns that underlie the principle of inviolability simply are inapplicable to service of process to obtain jurisdiction over a private third party. App. 193a-195a. The U.N. Convention itself specifies that the immunities afforded to representatives are "not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of *their functions in connection with the United Nations*." U.N. Convention, art. IV, § 14 (emphasis added).

Consistent with this Court's view of the limited role of service of process in *Henderson*, the District Court determined that "[g]rounds to give affront to the person or dignity of the foreign official, or to interfere with the officer's governmental functions, do not arise in this context, or may do so only minimally or to a degree substantially outweighed by other interests of justice." App. 194a. Service of process does not entail the official's appearance in court. Nor does it subject him to the court's compulsory powers in a manner that could be seen as an assertion of territorial authority over the foreign dignitaries and the foreign state they represent. App. 194a-196a. Although *notice* of a pending legal action—the "core function" of service of process—was served on Mugabe and Mudenge as party officials, the notice sought the exercise of *court jurisdiction* over ZANU-PF—a private entity—rather than over Mugabe or Mudenge personally. *Henderson*, 517 U.S. at 671. And it was ZANU-PF, not Mugabe or Mudenge, that was called to answer this notice. App. 194a.

By sweeping service of process for a third party into its inviolability analysis, the court below drastically disrupted this Court's view of service of process. And the two cases on which it relied had nothing to do with service of process on a non-immune third party. In *Hellenic Lines*, 345 F.2d at 979-981, the issue was whether a diplomat could be served as an agent *of a foreign government*, not as an agent of a private, non-immune entity like ZANU-PF. And in *767 Third Avenue Associates* v. *Permanent Mission of Zaire*, 988 F.2d 285 (2d Cir. 1993), the issue was whether mission premises were inviolable under Article 22 of the Vienna Convention. *Id.* at 298 (stating that the U.N. Convention "shed little light" on inviolability of mission premises).

Equally important and problematic for the opinion below, neither *Hellenic Lines* nor *767 Third Avenue Associates* involved a claim under the ATS or the TVPA. *See Hellenic Lines*, 345 F.2d at 979 (involving libel in personam); *767 Third Ave. Assocs.*, 988 F.2d at 296 (involving landlord-tenant dispute). The government's position in this case, adopted by the panel below, is precisely the position that the State Department presented to Congress—and that Congress rejected in enacting the TVPA.[16] The panel erroneously ignored this fact in authoring a decision that undermines enforcement of the TVPA. *Cf. Breard* v. *Greene*, 523 U.S. 371, 378 (2001) ("We have held 'that an Act of Congress * * * is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.' ") (quoting *Reid* v. *Covert*, 354 U.S. 1, 18 (1957)).

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[16] The State Department had argued that the TVPA could "interfere with complex and multifarious foreign policy" and "create serious frictions and tensions with other nations" that would "hamper U.S. foreign policy." *See Torture Victim Act of 1989: Hearing No. 101-1284 Before Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. (1990) (Statement of John O. McGinnis) at 8, 10. Congress found these concerns outweighed by the fact that "more than one-third of the world's governments engage in, tolerate, or condone" torture and extra-judicial killings. S. Rep. No. 102-249 (1991) at 3.

Under the Second Circuit's decision, the U.N. Convention and the Vienna Convention will effectively grant private parties an immunity that neither convention contemplates. That result undermines the congressional purposes underlying the passage of the TVPA and the ATS, further reinforcing the errors below and the importance of this case.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 03-6033(L), 03-6043(XAP)

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, EFRIDAH PFEBVE, ON HER OWN BEHALF AND ON BEHALF OF HER LATE BROTHER METTHEW PFEBVE, ELLIOT PFEBVE, ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHER METTHEW PFEBVE, EVELYN MASAITI, ON HER OWN BEHALF, MARIA DEL CARMEN STEVENS, ON HER OWN BEHALF, ON BEHALF OF HER LATE HUSBAND DAVID YENDALL STEVENS, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees-Cross-Appellants,

ROBERT GABRIEL MEGABE, IN HIS INDIVIDUAL AND PERSONAL CAPACITY, ZIMBABWE AFRICAN NATIONAL UNION-PATRIOTIC FRONT, STAN MUDENGE, JONATHAN MOYO, CERTAIN OTHER UNKNOWN NAMED SENIOR OFFICERS OF ZANU-PF,

Defendants,

v.

UNITED STATES OF AMERICA,

Intervenor-Appellant-Cross-Appellee.

Argued March 5, 2004
Decided October 6, 2004

Before: WALKER, *Chief Judge*, CARDAMONE, *Circuit Judge*, and GLEESON, *District Judge*.*

JOHN M. WALKER, JR., *Chief Judge*:

The United States appeals from a default judgment entered by the United States District Court for the Southern District of New York (Victor Marrero, *Judge*) against defendant the Zimbabwe African National Union-Patriotic Front ("ZANU-PF") for violations of the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350 (2001), the Torture Victim Protection Act of 1991 ("TVPA"), Pub.L. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), and international human rights norms. Plaintiffs cross-appeal from the district court's dismissal, for lack of subject-matter jurisdiction, of a host of similar claims brought against individual defendants Robert Mugabe and Stan Mudenge. The appeal and cross-appeal both turn on questions of immunity. The district court held that Mugabe and Mudenge were entitled to diplomatic and head-of-state immunity, but that their immunity did not protect them from service of process as agents for ZANU-PF—a non-immune, private entity. Accordingly, in the district court's view, ZANU-PF was properly served with process and thus subject to a default judgment upon failure to appear in this litigation. For the reasons that follow, we affirm the district court's dismissal of the claims against Mugabe and Mudenge but reverse its judgment against ZANU-PF and remand for entry of a judgment dismissing plaintiffs' claims against ZANU-PF.

BACKGROUND

ZANU-PF is a private political party whose members have ruled Zimbabwe since 1980. At all relevant times, Robert Mugabe was the President of Zimbabwe and the President and First Secretary of ZANU-PF, and Stan Mudenge was the

* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

Zimbabwean Foreign Minister and a ZANU-PF official. In September 2000, Mugabe and Mudenge visited New York City as delegates to the United Nations ("U.N.") Millennium Summit. During their visit, they attended (and Mugabe spoke at) a private political rally and fund-raiser at a church in Harlem—an event that was sponsored by a non-governmental organization called "Friends of ZANU-PF." Just before he entered the church, Mugabe was served with two copies of the complaint in this action, one in his personal capacity and the other on behalf of ZANU-PF. The next day, Mudenge was served with a copy of the same complaint on the street outside the Zimbabwe Mission building.

The complaint sought redress against Mugabe, Mudenge, ZANU-PF, and others for alleged violations of the ATCA, the TVPA, and international human rights norms. Plaintiffs (all of whom are Zimbabwean nationals) allege that they and/or their family members were subjected to torture, assault, execution, and other acts of violence at the hands of ZANU-PF members and upon the orders of ZANU-PF officials, including Mugabe and Mudenge. Mugabe and Mudenge were sued in their individual, not official, capacities. None of the defendants appeared before the district court at any stage of the ensuing litigation.

Several months after Mugabe and Mudenge were served with process, the United States filed a "suggestion of immunity" pursuant to 28 U.S.C. § 517[1] in which it asserted that the claims against the two men should be dismissed on grounds of diplomatic and head-of-state immunity. The Government further argued that the claims against ZANU-PF should be dismissed because "under both the head of state and diplomatic immunity doctrines, [Mugabe and Mudenge] had 'personal inviolability' and could not be served with legal process in any capacity, including on behalf of ZANU-PF."

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[1] Section 517 provides that "any officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

J.A. at 326-35 (Suggestion of Immunity Submitted by the United States of America, dated February 23, 2001).

In response to the Government's suggestion, plaintiffs argued that: (1) the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 to 1611—not the Government's suggestion of immunity—governs immunity determinations concerning heads of state; (2) the FSIA does not afford Mugabe and Mudenge immunity in this case because the two are alleged to have committed human rights violations in their non-official capacities; and (3) Mugabe and Mudenge were not entitled to diplomatic immunity during the course of their U.N.-sponsored trip to New York City and, thus, could be both sued individually and served with process as agents for ZANU-PF.

On October 30, 2001, the district court issued an order and decision dismissing the claims against Mugabe and Mudenge on immunity grounds but entering a default judgment against ZANU-PF. *See Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) ("*Tachiona I*"). The court concluded that the executive branch's suggestion of immunity, not the FSIA, governed immunity for heads of state, and that the suggestion mandated dismissal of the claims against Mugabe and Mudenge. *See id.* at 296-97. It also held, in the alternative, that diplomatic immunity precluded plaintiffs' suit against Mugabe and Mudenge. *See id.* at 297, 302. But the district court found that neither head-of-state immunity nor diplomatic immunity shielded foreign officials from service of process as agents for a private entity and, therefore, that Mugabe and Mudenge could be served as agents for ZANU-PF. *See id.* at 309. Thus, in the district court's view, ZANU-PF had been properly served and, having failed to appear in the action, was subject to a default judgment.

The Government moved for reconsideration and to intervene for purposes of appeal. On February 14, 2002, the district court denied the Government's motion for reconsideration, but granted its motion to intervene. *See Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 397 (S.D.N.Y. 2002) ("*Tachiona II*"). In a final judgment dated December 19, 2002, following a

damages inquest, the court held ZANU-PF liable for $20,250,453 in compensatory damages and $51,000,000 in punitive damages.

DISCUSSION

In its appeal, the Government argues that the district court erred in determining that neither head-of-state immunity nor diplomatic immunity protected Mugabe and Mudenge from service of process as agents for ZANU-PF. Plaintiffs respond in the alternative, asserting that: (1) the Government lacks standing to appeal the district court's judgment against ZANU-PF in the absence of ZANU-PF's own demand for review of the judgment; and (2) on the merits, the default judgment against ZANU-PF should be upheld. They also cross-appeal the district court's dismissal of the claims against Mugabe and Mudenge. Our authority to review the merits depends on whether the Government has standing to appeal; we therefore address that issue first.

I. Standing

Because Article III of the Constitution permits the adjudication of "Cases" or "Controversies" only, litigants appearing before federal courts must demonstrate that they have standing to invoke the court's jurisdiction. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). To claim standing, a litigant must have suffered " 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.' " *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted). The Article III standing requirement "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id.* (citing *Diamond v. Charles*, 476 U.S. 54, 62 (1986)). To have standing at the appellate stage, however, a litigant must demonstrate "injury caused by the judgment rather than injury caused by the underlying facts." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3902, at 63 (2d ed. 1992); *see also Diamond*, 476 U.S. at 62 ("[T]he decision to seek review must be placed

'in the hands of those who have a direct stake in the outcome[,]' . . . not . . . in the hands of 'concerned bystanders[.]' ") (citations omitted).

The Government sought the district court's permission to intervene for purposes of appeal pursuant to Rule 24(a) of the *Federal Rules of Civil Procedure*, and the district court granted that request. Although the Government's motion was both proper and prudent, *see Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) (a non-party seeking to appeal a judgment of the district court should first seek leave to intervene for purposes of appeal in the district court), a district court's grant of a motion to intervene for purposes of appeal does not, by itself, confer standing on the intervenor to appeal "in the absence of the party on whose side intervention was permitted." *Diamond*, 476 U.S. at 68. (Here, of course, ZANU-PF is not appealing.) Resolution of the standing question entails a separate inquiry into whether the Government's asserted injury and interest "fulfill[ ] the requirements of [Article] III." *Id.*

Plaintiffs argue that the Government has no standing to bring this appeal because it is not "bound" by the judgment of the district court and because, even if *res judicata* effect is not a prerequisite to standing, the Government's purported interests are too amorphous to confer standing.[2] Although plaintiffs' arguments are not without some force, we ultimately find them to be unpersuasive.

As plaintiffs note, it is well established that a party not bound by a judgment cannot appeal a district court's decision

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[2] Plaintiffs also contend that the Government cannot "interfere with litigation brought by and against private parties" unless "Congress has expressly authorized such action." Rep. Br. of Plaintiffs-Appellees-Cross-Appellants, at 7. But the only authority cited in support of this proposition, *Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978), expressly acknowledges that "the United States may sometimes sue without statutory authority," for example, when the case involves a "national issue of great moment or urgency." *Id.* at 339.

on the sole ground that the decision sets a precedent unfavorable to the would-be appellant. *See Boston Tow Boat Co. v. United States*, 321 U.S. 632, 633 (1944). More generally, a party not bound by a judgment will, in the usual case, have difficulty showing that it meets the Article III standing requirement. *See, e.g., Arizonans for Official English*, 520 U.S. at 66 (expressing "grave doubts" as to whether parties who "were not bound by the judgment" of the district court had Article III standing to appeal). But that is not because there is a *per se* bar against appeals by parties not bound by the judgment; rather, it is because such parties normally will not have sustained a "legal injury, actual or threatened," as a result of the judgment. *See Edward Hines Yellow Pine Trs. v. United States*, 263 U.S. 143, 148 (1923) (cited in *Boston Tow Boat*, 321 U.S. at 634). By contrast, we think the asserted injury to the Government's interests in this case, caused by the district court's judgment, is sufficiently concrete to give it standing to bring this appeal.

The Government claims that the district court's judgment invaded its legally protected interests in two ways: (1) it placed the United States in violation of certain international treaties; and (2) it usurped the executive branch's exclusive authority to set the terms upon which the United States receives foreign ambassadors. As to the first, the Government argues that the district court's decision interferes with its obligation to ensure that the United States complies with the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502 (entered into force in U.S. Dec. 13, 1972) [hereinafter Vienna Convention], and the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900 (ratified by the U.S. Apr. 29, 1970) [hereinafter U.N. Convention on Privileges and Immunities]. The existence of the asserted interest can hardly be disputed; pursuant to Article II of the Constitution, the President has "the Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. art. II, § 2, cl. 2. A corollary to the executive's power to enter into treaties is its obligation to ensure that the United States complies with them.

Here, the district court was called upon to interpret the U.N. Convention on Privileges and Immunities and the Vienna Convention. The Government's claim that the district court's interpretation contravenes the intent of the treaties' signatories, placing the United States in breach of its international obligations, alleges a concrete invasion of the executive's legal interest. *See, e.g., Roeder v. Iran*, 333 F.3d 228, 233-34 (D.C. Cir. 2003), *cert. denied*, ___ U.S. ___, 124 S. Ct. 2836 (2004). In *Roeder*, the District of Columbia Circuit considered whether the United States had standing to intervene as a defendant in a lawsuit against the Iranian government. Although the court questioned whether a defendant-intervenor must satisfy the Article III standing requirement, *see id.* at 233-34, it assumed the requirement applied, and concluded that because the Government had "established that it was in imminent danger of suffering injury in fact—a breach of its obligations under the [Algiers] Accords," it had standing, *id.* at 233-34. *See also, e.g., Sanitary Dist. v. United States*, 266 U.S. 405, 425 (1925) ("[The United States] has a standing in this suit . . . to carry out treaty obligations to a foreign power . . . , and no statute is necessary to authorize the suit [by the Attorney General]."); *United States v. County of Arlington*, 669 F.2d 925, 929-30 (4th Cir. 1982) (United States had standing to initiate action to seek relief from conduct that would, *inter alia*, cause treaty violation). The only apparent distinction between the foregoing cases and this one is that here it is the district court's decision, and not the action of any party, that threatens a breach of the United States's treaty obligations. For purposes of standing, that is a distinction without a difference.

The Government next argues that the district court's decision upholding service of process on Mugabe and Mudenge as agents for ZANU-PF usurped the executive branch's constitutional authority to conduct foreign affairs and to send and receive ambassadors. Plaintiffs do not dispute that the power to conduct foreign affairs is vested principally in the executive branch. Indeed, Article II, section 3 of the Constitution assigns to the President the authority to "receive Ambassadors and other public Ministers," while (as discussed

above) Article II, section 2 gives the President the power to make treaties, albeit with the advice and consent of the Senate.

> Taken together with the command of Article II, [section] 3 that the President "shall take Care that the Laws be faithfully executed," these constitutional provisions have come to be regarded as explicit textual manifestations of the inherent presidential power to administer, if not necessarily to formulate . . . , the foreign policy of the United States.

Lawrence H. Tribe, *American Constitutional Law* § 4-3, at 638 (3d ed. 2000); *see, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("The Court . . . has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.' ") (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). Courts have long construed this executive authority to encompass a near-exclusive power to dictate the terms upon which foreign diplomats are received in this country. *See, e.g., Nat'l Petrochemical Co. of Iran v. The M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988) (noting that an incident to the executive's constitutional powers is the President's "exclusive authority to recognize or refuse to recognize a foreign state or government and to establish or refuse to establish diplomatic relations with it"); *see also United States v. Al-Hamdi*, 356 F.3d 564, 572-73 (4th Cir. 2004) (holding that State Department's certification that an individual was not entitled to diplomatic immunity was "conclusive evidence" of lack of entitlement because of the executive's power to send and receive ambassadors) (citing *In re Baiz*, 135 U.S. 403, 421 (1890), and *Ex Parte Hitz*, 111 U.S. 766, 767 (1884)).

Plaintiffs contend nevertheless that the alleged injury to the Government's authority to receive foreign ambassadors is too abstract to permit the Government to appeal the decision below. To support this proposition, they rely on the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997), in which individual members of Congress were held to lack standing to challenge a line-item veto statute because they "alleged no injury to themselves as individuals [and] the

institutional injury they alleg[ed] [was] wholly abstract and widely dispersed." *Id.* at 829. But *Raines* is distinguishable in crucial respects from the instant case. First, *Raines* involved a constitutional challenge to an action taken by one of the other two branches of the Federal Government—a fact that the Court believed merited an "especially rigorous" standing inquiry because it implicated the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Id.* at 819-20. Here, by contrast, we are not being asked to review the actions taken by another branch, but rather to determine whether a component of our own branch of government, *i.e.*, the district court, has overstepped its bounds. That kind of review is the standard grist of appellate courts.

Second, the basis for the Supreme Court's denial of standing in *Raines* was that the individual members of Congress had not alleged any personal injury to themselves, and their alleged institutional injury—*viz.*, that the line-item veto, irrespective of whether it was used by the President, altered the " 'meaning' " and " 'effectiveness' " of the members' votes, *id.* at 817, 825-26—was "wholly abstract and widely dispersed."[3] Here, the executive branch's institutional interest in protecting its authority to conduct foreign affairs and receive foreign ambassadors is not "abstract" because the direct effect of the district court's ruling would be to permit service of process upon Mugabe and Mudenge—a result that, if the Government is correct, would violate executive norms and treaty obligations.

The Court in *Raines* was careful to distinguish the situation in which, for example, a legislator's vote is nullified, *see Coleman v. Miller*, 307 U.S. 433, 446-47 (1939) (state senators had standing to challenge ratification of a constitutional amendment which had been effected, despite senate deadlock, when the lieutenant governor cast the deciding vote),

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[3] *Id.* at 829. Both Houses of Congress "actively oppose[d]" the plaintiffs' lawsuit, a fact to which the Court "attach[ed] some importance." *Id.*

from a situation, like the one in *Raines*, where the only injury claimed is an "abstract dilution of institutional legislative power" that resulted from the President's discretion to exercise a line-item veto. *Raines*, 521 U.S. at 826. The executive's interest in this case is more akin to that in *Coleman*; the allegation is not that the district court's decision may have resulted in dilution of the executive's constitutional authority to conduct foreign affairs, but that it interfered in a direct, articulable way with that authority. *See also United States ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153, 155-56 (1953) (holding that the Secretary of Interior had standing to bring an action challenging the Federal Power Commission's authority to grant a license because the license conflicted with the Secretary's statutory duties).

We conclude that the asserted adverse effects of the district court's decision on the Government's interests in (1) ensuring that the United States does not violate its treaty obligations, and (2) guarding its authority to set the terms upon which foreign ambassadors are received, are sufficient to confer standing on the Government to appeal the district court's ruling upholding the service of process on Mugabe and Mudenge as agents for ZANU-PF. Assuming *arguendo* that the Government must also establish that it has standing to defend the district court's ruling concerning Mugabe and Mudenge's immunity from suit, *cf. Roeder*, 333 F.3d at 233, the two interests it has asserted suffice for that purpose as well; the cross-appeal, no less than the appeal, implicates the executive branch's constitutional powers and responsibilities in the arena of international relations. The threshold standard having been met, we now turn to the merits of the appeal and cross-appeal.

II. The Merits

The Government's argument on appeal—that Mugabe and Mudenge were shielded from service of process as agents for ZANU-PF—presupposes the correctness of the district court's ruling that the two individuals enjoyed diplomatic and/or head-of-state immunity; if the two were not immune from suit, then they could not claim that their protected status also

shielded them from service of process as agents for a non-immune entity. Logic therefore compels us to first consider the merits of plaintiffs' cross-appeal challenging the district court's immunity finding before addressing the Government's appeal.

A. *Diplomatic Immunity*

The district court dismissed plaintiffs' claims against Mugabe and Mudenge because, *inter alia*, it concluded that the two were entitled to diplomatic immunity under the U.N. Convention on Privileges and Immunities and the Vienna Convention. We affirm for substantially the same reasons articulated by the district court.

The immunities afforded temporary representatives like Mugabe and Mudenge who visit the United States for a U.N. conference are set forth in Article IV, section 11 of the U.N. Convention on Privileges and Immunities:

> Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities:
>
> a. immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;
>
> b. inviolability for all papers and documents;
>
> c. the right to use codes and to receive papers or correspondence by courier or in sealed bags;
>
> d. exemption in respect of themselves and their spouses from immigration restrictions, alien registration or national service obligations in the state they are visiting or

through which they are passing in the exercise of their functions;

e. the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

f. the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

g. such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

U.N. Convention on Privileges and Immunities, *supra*, 21 U.S.T. 1418, art. IV, § 11. The only part of this section that expressly addresses the immunity from legal process afforded temporary U.N. representatives is section 11(a). Standing alone, section 11(a) would not protect Mugabe and Mudenge from suit based on any acts of violence they perpetrated in Zimbabwe, because such acts are not "acts done by them in their capacity as representatives." Section 11(g), however, extends to temporary U.N. representatives "such other privileges, immunities and facilities not inconsistent with [sections 11(a) to (f)] as diplomatic envoys enjoy."

The Vienna Convention, which governs the privileges and immunities that are extended to diplomatic envoys, provides for a much more robust form of immunity from legal process than that afforded by section 11(a) of the U.N. Convention on Privileges and Immunities. With limited exceptions, it broadly immunizes diplomatic representatives from the civil jurisdiction of the United States courts.[4]

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[4] Article 31 of the Vienna Convention provides in relevant part:

Plaintiffs argue that reading section 11(g) of the U.N. Convention on Privileges and Immunities to extend to Mugabe and Mudenge the full measure of immunity set forth in Article 31 of the Vienna Convention would be "inconsistent with" section 11(a) of the U.N. Convention on Privileges and Immunities because section 11(a) expressly limits the scope of immunity from legal process that temporary U.N. representatives can enjoy. In plaintiffs' view,

> [s]ection 11(g) should not be read to "override" [sections 11(a) to (f)], but should instead be read to be a reference to "privileges, immunities, and facilities" afforded to diplomats but *not* specifically referenced in [sections 11(a) to (f)], such as the right to use the representative's national flag on his means of transport (Vienna Convention Art. 20).

Reply Br. of Plaintiffs-Appellees-Cross-Appellants, at 28.

We join the district court in declining to adopt plaintiffs' overly narrow interpretation of section 11(g). "When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used." *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988)) (internal quotation marks omitted). "[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written

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(1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.* at 535 (quoting *Air France v. Saks*, 470 U.S. 392, 396 (1985)) (internal quotation marks omitted). Further, in construing treaty language, "[r]espect is ordinarily due the reasonable views of the Executive Branch." *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999); *see Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). "But where the text [of the treaty] is clear, . . . [courts] have no power to insert an amendment." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

Applying these principles, we conclude, as a preliminary matter, that the text of section 11 of the U.N. Convention on Privileges and Immunities is ambiguous. It is not clear what would make a particular immunity or privilege "inconsistent with" any of the privileges and immunities specifically enumerated in section 11. Would the proposed immunity or privilege have to render the exercise of an enumerated privilege or immunity impossible? Or would it be enough (as plaintiffs assert) for it to negate certain limitations or conditions that otherwise would attach to the exercise of an enumerated privilege or immunity? The answer is not evident from the face of the treaty. Therefore, we must resort to other interpretive tools.

Plaintiffs argue that ordinary principles of statutory construction do not permit a reading of section 11(g) that would expand the circumstances under which immunity from legal process attaches. First, they point out that reading section 11(g) as a grant of near-absolute immunity from suit would render section 11(a) superfluous—a result not favored by principles of statutory construction. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001). Second, they cite the rule that, where a statutory text lists a number of items *seriatim* (as in sections 11(a) to (f)), the specific qualifications in one provision cannot be overridden by a general catch-all

clause (like section 11(g)). *See id.* at 114-15 (general phrases are "controlled and defined by reference to the enumerated categories"); *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996).

These arguments are not without force. But while general principles of statutory construction "may be brought to bear on difficult or ambiguous passages" of a treaty, *Schlunk*, 486 U.S. at 700, the understandings of the treaty signatories and the views of the executive branch are at least as important in resolving ambiguity. *See Saks*, 470 U.S. at 396; *see also Hakala v. Deutsche Bank AG*, 343 F.3d 111, 116 (2d Cir. 2003) ("General principles of statutory construction are notoriously unreliable."). Here, those understandings and views overwhelmingly support an interpretation of section 11(g) that would accord the full protection of Article 31 of the Vienna Convention to temporary U.N. representatives.

First, the United States government officials who ratified the U.N. Convention on Privileges and Immunities plainly believed that it would afford full diplomatic immunity to temporary U.N. representatives. Two excerpts from a report of the Senate Committee on Foreign Relations, which was charged with considering whether the United States should ratify the U.N. Convention on Privileges and Immunities, are particularly relevant.[5] *See generally* Comm. on Foreign Relations, *Convention on the Privileges and Immunities of the United Nations*, S. Exec. Rep. No. 91-17, at 3, 11-12 (1970) [hereinafter Senate Report]. The first is a statement by State

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[5] Plaintiffs contend that statements made during the pre-ratification hearings in the Senate cannot be used to divine the meaning of the Convention because they "were made twenty-four years *after* the Convention was drafted and adopted by the U.N. General Assembly." Rep. Br. of Plaintiffs-Appellants-Cross-Appellants, at 30 (emphasis in original). Contrary to plaintiffs' contention, however, the Supreme Court has expressly approved the use of such materials in interpreting international treaties, and has even suggested that they are *more* useful than treaties' negotiation history. *See United States v. Stuart*, 489 U.S. 353, 367-68, 367 n.7 (1989).

Department Legal Advisor John R. Stevenson during hearings before the committee on March 9, 1970. He said:

> At the present time resident representatives are already granted full diplomatic privileges and immunities under the headquarters agreement.[6] Nonresident representatives, on the other hand, are only covered by the International Organizations Immunities Act and that grants them immunities relating to acts performed by them in their official capacity.
>
> Under the [U.N. Convention on Privileges and Immunities], the nonresident representatives would also receive full diplomatic privileges and immunities.
>
> . . . .
>
> . . . [M]any of the nonresident representatives are distinguished parliamentarians who come to New York for very short periods of time and we believe they should be treated with the same respect as the permanent representatives.

Id. app. at 11-12 (Stat. of Hon. John R. Stevenson, Legal Advisor, Dep't of State). The second excerpt is a statement of the Senate Committee itself:

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[6] At the time of these hearings, the "headquarters agreement" between the United States and the U.N. governed immunity from suit for *resident* U.N. representatives. *See* Agreement respecting the headquarters of the United Nations, June 26, 1947, U.S.-U.N., 61 Stat. 3416, T.I.A.S. No. 1676 (entered into force Nov. 21, 1947). Article V, § 15 of the headquarters agreement provided that resident representatives "shall . . . be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as [the United States] accords to diplomatic envoys accredited to it." *Id.* at 3428.

By contrast, *temporary* U.N. representatives were only "immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as . . . representatives." 22 U.S.C. § 288d(b) (2001).

> With regard to representatives of members, currently only resident representatives of permanent missions to the U.N. have full diplomatic immunities. Nonresident representatives enjoy only functional immunities; that is, immunities with respect to their official acts. Under the [U.N. Convention on Privileges and Immunities], these nonresident representatives will also be entitled to full diplomatic immunities.

Id. at 3.

As evidenced by these excerpts, the Senate Committee on Foreign Relations and the State Department both believed that the U.N. Convention on Privileges and Immunities would confer more than just "functional" immunity, *i.e.*, the type of immunity described in section 11(a), on temporary U.N. representatives; they understood that such representatives would be afforded "full diplomatic immunities." *Id.* That section 11(g) was intended to supplement the protection provided by section 11(a) is further supported by a table submitted by State Department Legal Advisor Stevenson during the March 9, 1970 hearings, the purpose of which is to illustrate the effect of the U.N. Convention on Privileges and Immunities in certain typical civil and criminal situations involving "nonofficial activities." *Id.* app. at 29 (table). The table indicates that, in contrast to prior law, "Nonresident (temporary) representative[s]" would be "immune from suit or prosecution *under sec. 11(g).*" *Id.* (emphasis added).

This inclusive interpretation of section 11(g) was also adopted by former U.N. Secretary-General Kurt Waldheim in a 1976 opinion concerning immunity from legal process:

> Section 11 of [the] Convention specifies the more important immunities attaching to "the representatives of Members[,"] including "immunity from legal process of every kind[,"] and, in subsection (g) thereof, explicitly extends to representatives, in addition, "such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy" . . . . In other words, taken as a whole, Section 11 of the Convention *in*

> *fact confers . . . diplomatic privileges and immunities* on the representatives of Members.

1976 U.N. Jurid. Y.B. 224, 227 (emphasis added). Taken together, Secretary-General Waldheim's opinion, the Senate Report excerpts discussed above, and the broad interpretation of section 11(g) advanced by the Government in this litigation (which is accorded "great weight," *see Sumitomo Shoji Am.*, 457 U.S. at 185), persuade us that section 11(g) extends to temporary U.N. representatives like Mugabe and Mudenge the full range of immunity from legal process afforded by Article 31 of the Vienna Convention.

One potential obstacle remains, however, to affording Mugabe the full protection of Article 31 of the Vienna Convention: section 11 of the U.N. Convention on Privileges and Immunities stipulates that the immunities described therein, including the diplomatic immunities set forth in section 11(g), apply only while the U.N. representative is "exercising [his] functions and during [his] journey to and from the place of meeting." U.N. Convention on Privileges and Immunities, *supra*, 21 U.S.T. 1418, art. IV, § 11 (prefatory language). Whereas Mudenge was served with process outside of the Zimbabwe Mission building and, therefore, squarely within the parameters set forth in section 11, Mugabe was served with process while attending a ZANU-PF fund-raising rally, a private activity unrelated to his duties as a U.N. representative. Plaintiffs argue that because Mugabe was not acting in his capacity as a U.N. representative when he was served with copies of the complaint, he cannot claim immunity under section 11.

Taking our cue from former U.N. Secretary-General Waldheim, we decline to read the prefatory language of section 11 so narrowly. Secretary-General Waldheim, recognizing that U.N. representatives traveling to U.N. conferences typically engage in activities ancillary to their actual representative functions, interpreted the words "while exercising their functions" to mean "during the entire period of presence in the State . . . for reasons of the conference in question." 1976 U.N. Jurid. Y.B. 224, 228 (quoting 1967 Y.B.

Int'l L. Comm. at 176 ¶ 87). Waldheim explained that "to interpret [the prefatory words] so as to limit them to times when the person concerned is actually doing something as part of his functions as a representative . . . leads to absurd and meaningless results making such an interpretation wholly untenable." *Id.*

We can imagine hypothetical situations in which section 11's prefatory language might foreclose a temporary U.N. representative's entitlement to the immunities set forth in section 11; for example, if a representative were served with process months after the completion of a U.N. conference while traveling in the United States for purely personal reasons. But this is not such a case; Mugabe was served while the U.N. Millennium Summit was still in progress. Under the circumstances, he was entitled, through section 11(g), to the full protection of Article 31 of the Vienna Convention.

Having determined that Mugabe and Mudenge are subject to the terms of Article 31, we now consider whether any of the exceptions found in that Article apply. Article 31(1) provides:

> A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

Vienna Convention, *supra*, 23 U.S.T. 3227, art. 31(1). While plaintiffs concede the inapplicability of these exceptions to Mudenge, they assert that subsection (c) deprives Mugabe of immunity from legal process because the ZANU-PF rally that he attended "had nothing at all to do with [his] 'official functions' as a representative of Zimbabwe to the U.N." Br. of Plaintiffs-Appellees-Cross-Appellants, at 56. The key words in subsection (c), however, are "activity . . . *in the receiving State*." Plaintiffs' lawsuit falls outside the scope of subsection (c) because plaintiffs' claims do not "relat[e] to" Mugabe's activities at the rally; they relate to his activities in Zimbabwe.

Plaintiffs nevertheless attempt to identify a nexus between their lawsuit and the ZANU-PF rally by arguing that

> the rally seemed specifically designed to combat the extensive international outrage directed toward Mugabe personally and against ZANU-PF as an organization—outrage triggered specifically by the murderous tactics that ZANU-PF inflicted on its political opponents, such as the Plaintiffs in this case.

Br. of Plaintiffs-Appellees-Cross-Appellants, at 56. We decline to adopt this exceedingly broad conception of "relating to." Although the term "relating to" (or "related to"), when used in statutes, is typically defined more broadly than the term "arising out of," it still connotes a "connection" with, "reference to," or "associat[ion] with" its object. *See Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128-29 (2d Cir. 2001) (quoting Webster's Third New International Dictionary 117 (1986) and *Jackson v. Lajaunie*, 270 So.2d 359, 864 (La. 1972)) (internal quotation marks omitted). As we noted in *Coregis*, Webster's Dictionary defines "related" as "connected by reason of an established or discoverable relation." *Id.* at 128 (internal quotation marks omitted). Plaintiffs' complaint makes no "reference to," nor does it have an "established or discoverable relation" to, Mugabe's participation in the Friends of ZANU-PF rally; it is based entirely on events that occurred well before the rally and many thousands of miles away.

Since none of the other exceptions under Article 31(1) is relevant here, Mugabe and Mudenge are both entitled to diplomatic immunity from suit under the terms of the Vienna Convention and the U.N. Convention on Privileges and Immunities. Therefore, the claims filed against them individually were properly dismissed.

B. *Head-of-State Immunity*

The district court held that Mugabe and Mudenge were also entitled to immunity from suit as heads of state because the Government had filed a suggestion of head-of-state immunity on their behalf, which, in the court's view, was dispositive. *See Tachiona I*, 169 F. Supp. 2d at 297. Plaintiffs argue that this was error because the FSIA, not the executive's suggestion of immunity, governs head-of-state immunity determinations, and neither Mugabe nor Mudenge is entitled to the protections afforded under the Act.

We have some doubt as to whether the FSIA was meant to supplant the "common law" of head-of-state immunity, which generally entailed deference to the executive branch's suggestions of immunity. *See Ex Parte Peru*, 318 U.S. 578, 589 (1943); *see also Wei Ye v. Jiang Zemin*, 383 F.3d 620, 2004 WL 1984430, at *3 (7th Cir. Sept. 8, 2004) (holding that FSIA does not apply to heads of state). For one thing, the FSIA applies only to foreign states, which are defined as including "political subdivision[s]," and "agenc[ies] or instrumentalit[ies]" thereof. *See* 28 U.S.C. § 1603(a). "[A]genc[ies] [and] instrumentalit[ies]" in turn are defined in terms not usually used to describe natural persons. *See* 28 U.S.C. § 1603(b) (defining "agency or instrumentality" as an "entity" that, *inter alia*, is "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b)(2)). *But see, e.g., Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1100-03 (9th Cir. 1990) (holding that the FSIA grants immunity to lower foreign government officials for acts committed in their official capacity). Moreover, the only references to heads of state or other foreign officials in the

FSIA's legislative history suggest that their immunity is not governed by the Act. *See* H.R. Rep. No. 94-1487, at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620 (describing bill that would later become the FSIA as "deal[ing] only with the immunity of foreign states and not its diplomatic or consular representatives") [hereinafter House Report]; *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93rd Cong. 16 (1973) (statement of Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice) ("[W]e are not talking . . . in terms of permitting suit against the Chancellor of the Federal Republic [of Germany] . . . . That is an altogether different question.").

In light of our conclusion that the claims against Mugabe and Mudenge were properly dismissed on the basis of diplomatic immunity, however, we have no occasion to decide whether Mugabe and Mudenge were protected from suit by head-of-state immunity—whether under the terms of the FSIA or because of the Government's suggestion of immunity. Nor do we have any occasion to decide whether head-of-state immunity protected Mugabe and Mudenge from service of process as agents for ZANU-PF, *cf. Wei Ye*, 383 F.3d 620, 2004 WL 1984430, at *6 (holding that executive branch's "power to recognize the immunity of a foreign head of state includes the power to preclude service of process in that same suit on the head of state even where that service is intended to reach third parties"); that question is mooted by our conclusion, explained below, that diplomatic immunity rendered the service of process a nullity.

C. *Service of Process*

As discussed above, *see* Part II(A), *supra*, section 11(g) of the U.N. Convention on Privileges and Immunities extends to Mugabe and Mudenge the immunities that diplomats enjoy under the Vienna Convention. These include not only the immunity from legal process set forth in Article 31, but also the "inviolability" of the person:

> The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Vienna Convention, *supra*, 23 U.S.T. 3227, art. 29. The Government argues that the district court erred in holding that Article 29 of the Vienna Convention did not protect Mugabe and Mudenge from service of process as agents of process for ZANU-PF. *See Tachiona I*, 169 F. Supp. 2d at 309. We agree.

Although the term "inviolable" is not defined in the Vienna Convention, we have described it as "advisedly categorical" and "strong." *767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 298 (2d Cir. 1993) (discussing inviolability of mission premises under Article 22 of the Vienna Convention). The text of Article 29 makes plain that a person entitled to diplomatic immunity may not be arrested or detained. The scope of inviolability, however, extends further; Article 29 also protects against "attack[s]" on the "person, freedom or dignity" of the diplomatic envoy. Vienna Convention, *supra*, 23 U.S.T. 3227, art. 29. For example, courts have held that the inviolability principle precludes service of process on a diplomat as agent of a foreign government, *see Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 979-81 (D.C. Cir. 1965), and, as applied to missions, prevents a landlord from seeking to evict a diplomatic mission from its premises for non-payment of rent, *see 767 Third Ave. Assocs.*, 988 F.2d at 302.

The district court gave two principal reasons for its conclusion that the inviolability principle did not protect Mugabe and Mudenge from service of process as agents for ZANU-PF. First, it observed that the FSIA permits service of process on an agency or instrumentality of a foreign state by, *inter alia*, "delivery of a copy of the summons and complaint" to officers and agents of the agency or instrumentality, 28 U.S.C. § 1608(b)(2), which could conceivably include "a state official or diplomat otherwise entitled to immunity."

Tachiona I, 169 F. Supp. 2d at 306. The court did not suggest that § 1608(b)(2) provided any express justification for the service of process on Mugabe and Mudenge as agents for ZANU-PF (which is, after all, a private entity and not an agency or instrumentality of a foreign state), but thought the provision "contemplate[d] and legitimize[d] the point that the doctrine of inviolability does not serve as an absolute barrier to the service of process in certain limited circumstances." *Id.* at 306-07. Second, the district court implied from the fact that Article 31 of the Vienna Convention sets forth certain enumerated exceptions to immunity from suit that "service of process *per se* does not offend the concept of personal inviolability." *Id.* at 307. For the reasons that follow, we decline to adopt the district court's reasoning.

As the district court observed, the FSIA permits service of process on "an officer, a managing or general agent, or . . . any other agent authorized by appointment or by law to receive service of process in the United States" on behalf of an agency or instrumentality of a foreign state. 28 U.S.C. § 1608(b)(2). While it is true that, in the abstract, this category of persons could include agents or officers who are otherwise entitled to diplomatic immunity, we decline to construe the FSIA as a license to serve process on diplomatic and consular representatives, even as agents for private, non-immune entities. As a preliminary matter, § 1608(b)(2) permits personal service on an agent or officer of an *agency or instrumentality* of the foreign state (*e.g.*, the president of a foreign bank) *only*; absent special agreement, the FSIA does not permit personal service on agents or officers of the foreign state itself. *See* 28 U.S.C. § 1608(a); *Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816, 819-21 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978). While one can perhaps envision a situation in which the officer of the agency or instrumentality (like the bank president) is also a state official entitled to diplomatic immunity, such a coincidence is not so likely as to warrant the presumption that Congress intended, when it sanctioned service of process on agents and officers of an agency or instrumentality of a foreign state, to also permit service of

process on state officials entitled to diplomatic immunity. Indeed, the legislative history of the FSIA demonstrates unequivocally that the Act was not intended to affect the immunity of "diplomatic or consular representatives." House Report, *supra*, at 21, 1976 U.S.C.C.A.N. at 6620. Congress expressly stated that persons entitled to diplomatic immunity would not be proper agents for service under the FSIA:

> It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965), or upon consular representatives, *Oster v. Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd*, 238 F.2d 400 (2d Cir. 1956).

House Report, *supra*, at 25, 1976 U.S.C.C.A.N. at 6624. In light of these unambiguous statements, it was error for the district court to rely on the service-of-process provision of the FSIA as circumstantial evidence that service of process on individuals entitled to diplomatic immunity would not violate international law.

We also disagree with the district court's interpretation of the interplay between Articles 29 and 31 of the Vienna Convention. The district court reasoned that because Article 31 permits suit against—and, therefore, service of process upon—diplomats in certain limited circumstances, service of process does not violate the inviolability principle. *See Tachiona I*, 169 F. Supp. 2d at 307. But this reasoning turns controlling precedent on its head. In *767 Third Avenue Associates*, we explained that the inviolability principle "makes no provision for exceptions *other than those set forth in Article 31*." 988 F.2d at 298 (emphasis added). Accordingly, the fact that service of process is allowed in order to initiate the actions permitted by the express exceptions to inviolability does not mean that service of process on a diplomat is otherwise permissible under Article 29. If anything, that fact indicates that service of process on a diplomat in any action not specified in Article 31 would be improper; *767 Third Avenue Associates* mandates that unless the Article 31 exceptions apply, the term "inviolable" must be

accorded its fullest meaning, untempered by Article 31. *Id.* at 298-99.

In line with *767 Third Avenue Associates*, the State Department forcefully argues that Article 29 of the Vienna Convention should be interpreted to preclude service of process on persons entitled to diplomatic immunity, even where such persons are served on behalf of a non-immune, private entity. *See* J.A. at 336-39 (letters from the State Department to the Department of Justice). Not only is the Government's interpretation entitled to "great weight," *Sumitomo Shoji Am.*, 457 U.S. at 185, but it is also supported by authority and sound reasoning.

"Personal inviolability is of all the privileges and immunities of missions and diplomats the oldest established and the most universally recognized." *Satow's Guide to Diplomatic Practice* 120 (Lord Gore-Booth ed., 5th ed. 1979). It is "essential to ensure inviolability of the person of the ambassador in order to allow him to perform his functions without hindrance from the government of the receiving state, its officials and even private persons." Sen, *A Diplomat's Handbook of International Law and Practice* 107 (3d ed. 1988); *see also 767 Third Ave. Assocs.*, 988 F.2d at 298-99 (giving broad interpretation to the term "inviolab[le]").

It was with the foregoing considerations in mind that the District of Columbia Circuit ruled, in the *Hellenic Lines* case, that service of process on a diplomat as agent for a foreign government violated international law. *See* 345 F.2d at 980-81. The court noted four ways in which service of process might impair the performance of diplomatic functions or otherwise impinge upon a diplomat's dignity. First, diplomats would feel "obliged to restrict [their] movements to avoid finding [themselves] in the presence of a process server." *Id.* at 980 n.5 (quoting submission of State Department). Second, they would be diverted from their duties "by the need to devote time and attention to ascertaining the legal consequences" of the service of process. *Id.* Third, the manner in which process is served could be "publicly embarrassing." *Id.* at 981 n.5. Finally, permitting

service of process on foreign diplomats could be construed as a hostile act and, thus, could invite retaliatory practices in otherwise friendly countries. *Id.*

Plaintiffs seek to distinguish *Hellenic Lines* on the basis that, in that case, the plaintiff sought to serve process on a diplomat as an agent of a foreign government, not as an agent of a private, non-immune entity like ZANU-PF. Nothing in the D.C. Circuit's reasoning turned on the identity of the defendant, however. Rather, the court focused on the practical consequences of allowing service of process upon diplomatic agents, *see id.* at 980 n.5, consequences that are equally likely to follow whether the diplomat (or the U.N. representative enjoying diplomatic immunity) is served as an agent for a private entity or as an agent for a foreign government.

Like the court in *Hellenic Lines*, we have no reason to doubt the Government's assertion that, as a practical matter, service of process on a person entitled to diplomatic immunity both interferes with that person's representative functions and constitutes an affront to his or her dignity. *See id.*; *see also* Vienna Convention, *supra*, 23 U.S.T. 3227, art. 29. In light of this court's own admonition that the inviolability principle be construed broadly, *see 767 Third Ave. Assocs.*, 988 F.2d at 298-99, we hold that Article 29 of the Vienna Convention, as applied to Mugabe and Mudenge through Article IV, section 11(g) of the U.N. Convention on Privileges and Immunities, protected Mugabe and Mudenge from service of process as agents for ZANU-PF. Therefore, ZANU-PF was not properly served, and the claims against it should have been dismissed.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for entry of an order dismissing all remaining claims. Each party shall bear its own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6666 (VM)

ADELLA CHIMINYA TACHIONA, ET AL.,
Plaintiffs,

v.

ROBERT GABRIEL MUGABE, ZIMBABWE AFRICAN NATIONAL UNION-PATRIOTIC FRONT, STAN MUDENGE, ET AL.,
Defendants.

DECISION AND ORDER

Filed Dec. 12, 2002

VICTOR MARRERO, United States District Judge.

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I. BACKGROUND

Plaintiffs in this matter, all citizens of Zimbabwe, brought suit alleging violations of the Alien Tort Claims Act (the "ATCA"),[1] the Torture Victim Protection Act (the "TVPA")[2], fundamental norms of international human rights law, and Zimbabwe law. In a Decision and Order dated October 30, 2001, the Court dismissed on jurisdictional grounds Plaintiffs' claims naming as defendants Zimbabwe President Robert Mugabe ("Mugabe") and other Zimbabwe government officials entitled to invoke sovereign or diplomatic immunity. But the Court found a sufficient basis to exercise jurisdiction over the claims asserted against the Zimbabwe African National Union-Patriotic Front "ZANU-PF," the country's ruling party, through process personally served on Mugabe, who is also ZANU-PF's titular head.[3]

ZANU-PF failed to answer the complaint or otherwise appear in the case and a default judgment was entered against it. The Court then referred the matter to Magistrate Judge James C. Francis, IV for an inquest on damages. ZANU-PF did not appear in that proceeding as well. Consequently, the Magistrate Judge issued a Report and Recommendation on July 1, 2002 (the "Report") recommending awards of damages on Plaintiffs' claims under both the ATCA and the TVPA. The Court, in a Decision and Order dated August 7, 2002, adopted the Report's factual findings and determination

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[1] *See* 28 U.S.C. § 1350.

[2] *See* Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note).

[3] *See Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) ("*Tachiona I*"). The United States (the "Government"), which had filed a Suggestion of Immunity on behalf of Mugabe, moved for reconsideration, arguing that the Court's exercise of jurisdiction over ZANU-PF grounded on personal service on Mugabe was impermissible under federal law and international principles governing sovereign and diplomatic immunity that the Government suggested applied to Mugabe. The Court denied the Government's motion. *See Tachiona v. Mugabe*, 186 F. Supp. 2d 383 (S.D.N.Y. 2002) ("*Tachiona II*").

of damages relating to the torture and extrajudicial killing claims under the TVPA, but reserved judgment as to the award recommended under the ATCA.[4]

With regard to the ATCA claims, the Court determined that under its reading of applicable Second Circuit doctrine, as articulated in *Filartiga v. Pena-Irala*,[5] it was required to perform a choice of law analysis to determine the appropriate substantive law governing the adjudication of ATCA disputes alleging human rights abuses.[6] The Second Circuit recently reiterated this approach. In dictum in *Wiwa v. Royal Dutch Petroleum Co.*,[7] the court construed *Filartiga I* to hold that the "ATCA establishes cause of action for violations of international law but requiring the district court to perform a traditional choice-of-law analysis to determine whether international law, law of forum state, or law of state where events occurred should provide substantive law in such an action."

Because the choice of law question had not been addressed in prior proceedings on this matter, the Court directed the parties to brief the issue. Plaintiffs submitted a timely response. ZANU-PF did not respond. Consequently, the Court regards Plaintiffs' factual assertions, and the materials describing the content and meaning of Zimbabwe law as it pertains to the proceeding now before the Court, as unrefuted and accords them appropriate weight.

Noting that each of the seven ATCA claims they assert describes conduct that violates substantive rights recognized by the Zimbabwe Constitution and applicable municipal laws, Plaintiffs urge the Court to approve the corresponding award of damages recommended by the Report. For the reasons

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[4] *See Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002) ("*Tachiona III*").

[5] 630 F. 2d 876 (2d Cir. 1980) ("*Filartiga I*").

[6] *See Tachiona III*, 216 F. Supp. 2d at 268-69.

[7] 226 F.3d 88, 105 n. 12 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

described below, the Court adopts the recommendations of the Report with one modification.

II. DISCUSSION

A. LIMITATIONS OF CHOICE OF LAW

Plaintiffs contend that the Court's ATCA choice of law inquiry should focus on the existence of substantive rights violated by particular unlawful conduct and not on whether the law of the state where the alleged deprivation occurred recognizes specific causes of action defining those rights and prescribes particular remedies for their violation.

Before undertaking the choice of law analysis *Filartiga I* instructs, the Court is obliged, as a context for its ruling, to express some conceptual challenges and practical constraints the task inherently presents. At the outset, a central question raised by the endeavor is the purpose the choice of law findings are to serve. Does the analysis compel the application of one forum's pertinent law in its entirety? Or is it to be employed, as Plaintiffs suggest, for comparative ends, to identify various sources of relevant substantive rights and principles from which the Court may draw in fashioning the ATCA remedy most appropriate under the circumstances of the case?

Ordinarily, a choice of law assessment weighs the competing interests of the different jurisdictions that may have significant contacts and relationships with a given legal dispute and substantial stakes in the outcome. The task presupposes that in considering the various claims for application of one forum's decisional rules as opposed to another's, the substantive local law applied would be that of the jurisdiction which, in the final analysis, possesses the most significant relationships with the parties and the events and thus the most extensive interests in the outcome of the litigation.[8] Consequently, the governing rules the inquiry

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[8] *See Babcock v. Jackson*, 191 N.E. 2d 279, 284 (N.Y. 1963); *Restatement (Second) of Conflict of Laws* (1971) § 6 cmt. f. ("In

would compel would encompass the entire body of local law that normally would be brought to bear domestically to fully resolve the merits of the controversy were it litigated in that jurisdiction.[9]

Under strict obedience to these choice of law doctrines, courts may not disregard applicable municipal law that the analysis points to as the substantive decisional rule, and instead pick and choose from among other doctrinal sources to tailor a remedy specific to the occasion. As the Supreme Court has observed: "The purpose of a conflict-of-laws doctrine is to assure that a case will be treated [in] the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum."[10]

The adoption of these principles as the product of a choice of law evaluation of an ATCA claim poses a significant quandary. In some cases the relevant municipal law of the jurisdiction where the events occurred and where the parties reside, and thus whose application may be demanded under traditional choice of law precepts, may be inadequate or may conflict with federal principles embodied in the ATCA, or with international norms. In consequence, circumstances may arise, as in the instant case, in which rigid adherence to that local law may defeat the purposes of the ATCA.[11]

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general, it is fitting that the state whose interests are most deeply affected should have its local law applied.").

[9] *See Restatement (Second) of Conflict of Laws*, *supra* § 6 cmt. f; *see also Richards v. United States*, 369 U.S. 1, 11 (1962) (holding that under the Federal Tort Claims Act the reference to "law" is to "the whole law of the State where the act or omission occurred," including its choice of law rules).

[10] *Lauritzen v. Larsen*, 345 U.S. 571, 591 (1953); *see also Richards*, 369 U.S. at 13-14.

[11] *See, e.g., Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) ("*Filartiga II*"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 189-91 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1547-48 (N.D. Cal. 1987) ("*Forti I*").

The rub here arises because a strict reading of *Filartiga I* may suggest the possibility of such an outcome. In pointing to the distinction between the ATCA jurisdictional threshold, which requires consideration of international law, and the question of the substantive law to be applied to determine liability, the Second Circuit indicated that the choice of law inquiry is "a much broader one, primarily concerned with fairness." [12] The Circuit Court then intimated that in performing the choice of law assessment on remand, the district court could very well decide that considerations of fairness would require application of municipal law of the foreign state where the events occurred, in which event "our courts will not have occasion to consider what law would govern a suit under the [ATCA] where the challenged conduct is actionable under the law of the forum and the law of nations, but not the law of the jurisdiction in which the tort occurred."[13]

This Court, in performing the requisite choice of law inquiry in the instant case, grappled with the meaning and implications of the *Filartiga I* court's mandate. Under traditional choice of law inputs relevant to the matter at hand, the United States has a significant interest in providing a forum for the adjudication of claims under the ATCA alleging certain violations of international human rights law, thereby advancing the realization of the values embodied in universally recognized norms. [14] However, given the jurisdictional facts present here, Zimbabwe would have the predominant interests in the adjudication of this case pursuant to Zimbabwe law. All of the Plaintiffs are citizens of Zimbabwe. ZANU-PF is the country's ruling political party, headed by Mugabe. All of the events Plaintiffs describe as

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[12] *Filartiga I*, 630 F.2d at 889 (citing *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930)); *see also* Jeffrey M. Blum and Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 Harv. Int'l L.J. 53, 97-98 (1981).

[13] *Filartiga I*, 630 F.2d at 889.

[14] *See Wiwa*, 226 F.3d at 106; *Filartiga I*, 630 F.2d at 887.

constituting the actionable conduct and corresponding injuries occurred in Zimbabwe, arising out of political conflicts and social conditions prevailing there. Thus, the pertinent relationships between this action and the parties and underlying events are predominantly connected with Zimbabwe.[15] Zimbabwe therefore has a strong interest in the application of its local law to the resolution of a controversy so fundamentally rooted in that country.

But what decisional rules should apply if, as discussed below, the governing law of Zimbabwe, while in general terms recognizing some of the rights Plaintiffs invoke here under the ATCA, does not define specific causes of action to vindicate the particular claims asserted, or does not permit recovery of the kinds of damages Plaintiffs seek, or may otherwise bar liability, so that the effect of applying the entire municipal law of Zimbabwe to address the violations of international law here alleged would be to defeat some or all of Plaintiffs' claims and thus the remedy the ATCA contemplated?

Similar concerns have been articulated by other courts that have encountered and addressed these complexities in determining the source of substantive law to apply in adjudicating ATCA claims. The doctrinal underpinnings of the dilemma is best captured in the divergent approaches expressed by the concurring opinions of the Circuit Court in *Tel-Oren v. Libyan Arab Republic*,[16] as to whether the ATCA, beyond conferring federal court jurisdiction, creates a cause of action, and as to the sources of any substantive decisional rules governing suits invoking the statute.

As a threshold matter, as Judge Bork observed, international law ordinarily does not create causes of action conferring

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[15] *See Filartiga II*, 577 F. Supp. at 864 (finding on remand that choice of law analysis required application of Paraguay law because all of the parties were residents of that country and the underlying events happened there); *see also Restatement (Second) of Conflict of Laws*, *supra* § 6 cmt. f.

[16] 726 F. 2d 774 (D.C. Cir. 1984).

upon individuals a self-executing right to sue to vindicate particular violations of universally recognized norms.[17] Rather, many international human rights instruments merely enunciate in expansive generalities particular principles, aspirations and ideals of universal and enduring significance. These sources serve as fonts of broadly accepted behavioral norms that nations can draw upon in carrying out their obligations to their peoples. International law ordinarily leaves it to each sovereign state to devise whatever specific remedies may be necessary to give effect to universally recognized standards.[18] As noted by a leading commentator: "International human rights instruments do not legislate human rights; they 'recognize' them and build upon that recognition [ ]," which assumes the human rights' "preexistence in some other moral or legal order."[19]

To these ends, various international declarations, covenants and resolutions catalogue rights all persons should enjoy; affirm the obligations of nations to ensure those rights by means of implementing legislation; exhort governments to protect and promote widely recognized rights; and pronounce the global community's condemnations and renunciations of wrongful practices.[20] In the words of Judge Bork: "Some

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[17] *See id.* at 816-17.

[18] *See Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 703 cmt. c. [hereinafter the "*Restatement of Foreign Relations*"].

[19] *The International Bill of Rights* 12, 15 (Louis Henkin, ed.) (1981) [hereinafter "*The International Bill of Rights*"].

[20] *See, generally, Universal Declaration of Human Rights* (the "Universal Declaration"), G.A. Res. 217A(III), 3 U.N. GAOR, U.N. Doc. A/810 (1948), *reprinted in* United Nations Centre for Human Rights, *Human Rights: A Compilation of International Instruments* (hereinafter "*International Instruments*"), Vol. I, Pt. 1, at 1-7 (1994); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the "Torture Convention"), G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1984), *reprinted in International Instrument, supra*, Vol. I, Pt. 1, at 293-307; *International Covenant on Civil and Political Rights* (the "Civil and Political Rights Covenant" or the

define rights at so high a level of generality or in terms so dependent for their meaning on particular social, economic and political circumstances that they cannot be construed and applied by courts acting in a traditional adjudicatory manner."[21]

These norms and practices acquire the status of customary "law of nations" only insofar as they ripen over time into settled rules widely recognized and enforced by international agreements, by judicial decisions, by the consistent usage and practice of states and by the "general assent of civilized nations."[22]

But, because such customary principles and practices of sovereign states do not derive and acquire the status of law from the authoritative pronouncements of any particular deliberative body, they generally do not create specific

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"Covenant"), G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 21-40; *African Charter on Human and Peoples' Rights* (the "African Charter"), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *reprinted in International Instruments*, *supra*, Vol. II (1997), at 330-346; *American Convention on Human Rights* (the "American Convention"), OEA/Ser. K/xvi/1.1, Doc. 65, Rev. 1. Corr. 1, Jan. 7, 1970, 9 I.L.M. 101 (1970), *reprinted in International Instruments*, *supra*, Vol. II at 14-36; *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the "European Convention"), 213 U.N.T.S. 211, E.T.S. 5 (1950), *reprinted in International Instruments*, *supra*, Vol. II at 73-91.

[21] *Tel Oren*, 726 F.2d at 818 (Bork, J., concurring); *see also Xuncax*, 886 F. Supp. at 180; *but see Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring) (noting that in some cases, as in the United Nations Genocide Convention, states have specifically committed to carry out their international obligations through explicitly prescribed means, such as declaring a form of conduct as defined to constitute a crime).

[22] *The Paquete Habana*, 175 U.S. 677, 694 (1900); *see also United States v. Smith*, 18 U.S. 153, 160-61 (1820); *Filartiga I*, 630 F.2d at 880; *Restatement of Foreign Relations*, *supra* § 102; *Statute of the International Court of Justice*, June 26, 1945, Art. 38, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

"causes of action" or a self-executing right to sue entitling victims to institute litigation to vindicate violations of international norms.[23] As one court expressed this point: "While it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles."[24]

Nonetheless, under *Filartiga I*, certain wrongful conduct violates the law of nations, and gives rise to a right to sue cognizable by exercise of federal jurisdiction under the ATCA, when it offends norms that have become well-established and universally recognized.[25]

The *Filartiga I* court, however, did not explicitly address whether the federal right of action it inferred existed under the ATCA in fact derives from and is to be substantively adjudicated by principles drawn from international law or from federal or municipal law. Manifesting some ambiguity on this point, the court construed the ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by

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[23] *See Tel-Oren*, 726 F.2d at 778 ("[T]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws.") (Edwards, J., concurring).

[24] *Xuncax*, 886 F. Supp. at 180; *see also* Louis Henkin, *Foreign Affairs and the Constitution* 224 (1972) ("International law, itself, finally, does not require any particular reaction to violations of law . . . ."); *Restatement of Foreign Relations*, *supra* § 703 cmt. c.

[25] 630 F.2d at 888; *see also Alvarez-Machain v. United States*, 266 F.3d 1045, 1050 (9th Cir. 2001) (to be actionable under the ATCA, international norms must be "specific, universal and obligatory."); *Xuncax*, 886 F. Supp. at 184 (citing *Forti I*, 672 F. Supp. at 1540).

international law."[26] Rather, as stated above, the Second Circuit directed that once federal jurisdiction is properly exercised by means of the threshold determination that the claimant has asserted a recognized violation of international law, the rules of decision applicable to adjudication of the case must be decided by a choice of law inquiry employing the considerations set forth in *Lauritzen*.[27]

In his *Tel-Oren* concurrence, Judge Edwards endorsed the view of the Second Circuit that ATCA itself creates a right to sue for alleged violations of the law of nations.[28] He voiced a reservation, however, that the *Filartiga I* formulation "is not flawless" and recognized that the task the ruling entrusts to the district court at the threshold jurisdictional finding is daunting.[29] On this point, he noted that the *Filartiga I* approach "places an awesome duty on federal district courts to derive from an amorphous entity—*i.e.*, the 'law of nations'—standards of liability applicable in concrete situations."[30]

The difficulty inherent in the *Filartiga I* charge is compounded by the second phase of the inquiry the ruling mandates, that of deciding the substantive standards to apply in evaluating ATCA claims involving human rights abuses. The challenge has engendered significant conceptual division and divergent practices among the courts that have addressed the question. In *Tel-Oren*, for example, Judge Edwards suggested, as an alternative formulation to the *Filartiga I*

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[26] 630 F.2d at 887.

[27] *See Lauritzen*, 345 U.S. at 571. The Supreme Court in *Lauritzen*, a maritime case, articulated seven factors to be weighed in the relevant choice of law analysis: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured party; (4) allegiance of the defendant; (5) place of contract; (6) inaccessibility of foreign forum; and (7) the law of forum. *See id.* at 583-90.

[28] 726 F.2d at 780.

[29] *Id.* at 781.

approach, that litigation may be brought under ATCA asserting substantive rights of action defined as common law torts, with the rules of decision supplied by domestic law of the United States, as long as a violation of international law is also alleged.[31] The alternative also has been the subject of considerable differences among the courts and has generated numerous permutations and adaptations variously applying, as the basis of substantive law in ATCA adjudications, rules of decision drawn from: federal common law; the forum state; the foreign jurisdiction most affected; international law; or a combination of these sources.

In *Adra v. Clift*,[32] for example, the court applied the alternative formulation where the tort, that of abducting a child from a parent entitled to custody, was defined by municipal law, and the violation of the law of nations consisted of the misuse of a passport as the means to carry out the wrongful conduct. A variation of this approach was followed in *Trajano v. Marcos*,[33] where the Ninth Circuit endorsed the district court's application of the *Tel-Oren* alternative as modified to rely upon the domestic law of the foreign jurisdiction, rather than that of the United States, to provide the cause of action. But in *Doe v. Unocal Corp.*[34] the Ninth Circuit determined the liability of a private third-party in an ACTA claim by reference to international law, rather than the municipal law of the foreign state, or federal or forum state law, where the alleged violations implicate only peremptory norms (*jus cogens*).[35] In *Hilao v. Marcos*,[36]

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[31] *Id.* at 782.

[32] 195 F. Supp. 857 (D. Md. 1961). In *Tel-Oren*, Judge Edwards questioned the sufficiency of the *Adra* court's determination that misuse of a passport could rise to the level of a violation of international law for the purposes of invoking ATCA jurisdiction. 726 F.2d at 787 (Edwards, J., concurring).

[33] 978 F.2d 493, 503 (9th Cir. 1992) ("*Marcos I*").

[34] 2002 WL 31063976, at * (9th Cir. Sept. 18, 2002).

[35] *But see id.* at *27 (Reinhardt, J., concurring) (rejecting the majority's application of international law and noting that "courts should not *substitute* international law principles for established

another panel of the same court held that ATCA creates a cause of action for violations of universal human rights standards and applied federal law to decide a survival of claim issue without any choice of law analysis or review of municipal law.

In *Xuncax*, however, the court rejected the domestic law right to sue alternative in favor of a different approach. The court applied violations of international law as the basis for both the exercise of ATCA jurisdiction and as the source of the pertinent substantive cause of action "without recourse to other law".[37] Noting that municipal law may be inadequate to address in a meaningful way alleged violations of international human rights, the court suggested that under the approach it proposed "courts will be freer to incorporate the full range of diverse elements that should be drawn upon to resolve international legal issues than they would if bound to straightforward recurrence to extant domestic law."[38]

In *Wiwa*, the Second Circuit acknowledged these fundamental qualms and alternative formulations, but declined to reach the issue because its decision to sustain ATCA jurisdiction in the case before it was based on other grounds.[39] However, several considerations counsel against a narrow reading and rigid application of *Filartiga I* as compelling unyielding allegiance to municipal law derived from choice of law analysis to supply the exclusive substantive cause of action and rules of decision governing adjudication of the merits of international human rights claims invoking the ATCA.

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federal common law or other domestic law principles . . . unless a statute mandates that substitution, or other exceptional circumstances exist.") (emphasis in original).

[36] 25 F.3d 1467, 1475-76 (9th Cir. 1994) ("*Marcos II*").

[37] 886 F. Supp. at 182-83.

[38] *Id.*; *see also Filartiga II*, 577 F. Supp. at 863.

[39] 226 F.2d at 88 n.12.

First is the treatment of the issue by the district court on remand. Grappling with the difficulties its mandate from the Second Circuit presented, Judge Nickerson addressed the open questions head on.[40] While conducting the choice of law analysis enunciated by the Circuit Court's ruling, Judge Nickerson considered whether the "tort" to which that statute refers means "a wrong 'in violation of the law of nations' or merely a wrong actionable under the law of the appropriate sovereign state?"[41]

Judge Nickerson responded to this question by determining that the court's inquiry was not circumscribed by, nor did it necessarily end with, the municipal law of the foreign state where the alleged international tort occurred. The interests of the foreign state were relevant in this context, but only "to the extent they do not inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States."[42] Rather, the district court determined that definition of the relevant wrongful conduct should be guided by the norms and practices universally recognized by the international community, and not by the laws of a particular state. "[W]here the nations of the world have adopted a norm in terms so formal and unambiguous as to make it international 'law,' the interests of the global community transcend those of any one state."[43] Consistent with these principles, Judge Nickerson found that:

> [T]here is no basis for adopting a narrow interpretation of [the ATCA] inviting frustration of the purposes of international law by individual states that enact immunities for government personnel or other such exemptions or limitations. The court concludes that it should determine the substantive principles to be applied by looking to international law, which, as the Court of Appeals stated,

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[40] *See Filartiga II*, 577 F. Supp. at 862.

[41] *Id.* at 862.

[42] *Id.* at 863-64.

[43] *Id.* at 863.

"became a part of the common law *of the United States* upon the adoption of the Constitution."[44]

According to the broader view of the scope of the ATCA that Judge Nickerson propounded, Congress entrusted to the federal courts the task of determining the substantive rights to be applied to ATCA claims by reference to international standards, as well as the "power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law."[45] On this basis, the district court determined that the laws defining substantive rights recognized by the foreign state in the case before it (Paraguay) prohibited torture. The court applied that body of law to determine liability, but also found no provision in it authorizing punitive damages. Nonetheless, Judge Nickerson awarded such damages in order to effectuate the federal policy embodied in the ATCA and the clear objectives reflected in the international prohibition against state-promoted torture.[46]

Second, the broader approach adopted by the district court in *Filartiga II* has gained recognition and acceptance by other federal courts that have considered ATCA claims in the face of inadequate or conflicting municipal law of the foreign state. Under these circumstances, rather than relying wholesale on foreign municipal law, the courts uniformly have undertaken to fashion a remedy by reference to the full range of available decisional guides and sources, in particular principles derived from federal common law. These precedents speak to the shortcomings of an approach that would compel an undeviating or even primary reliance on municipal law to adjudicate claims under the ATCA.

In *Xuncax*, for example, given the ATCA's silence concerning a claimant's standing to bring suit to vindicate harms to another victim, the district court sought a suitable rule of decision to adjudicate claims for summary execution

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[44] *Id.* (quoting *Filartiga I*, 630 F.2d at 886) (emphasis in original).

[45] *Id.*

[46] *See id.* at 867.

and disappearance based on injuries to third persons. Relying on the doctrine that where federal legislation creates a cause of action without specifying vital details the courts look to analogous state law insofar as it would not defeat the purposes of the federal statute, the *Xuncax* court determined that the TVPA provided the most analogous remedy.[47] The court also invoked the TVPA to apply Guatemala law, rather than a forum state rule of decision which would have barred recovery, to decide the right of a sibling to sue under the ATCA.[48]

Similarly, in *Forti I* the district court faced a choice of whether to apply a federal or state limitations period. It found a germane analogy in the federal Civil Rights Act,[49] and did not feel compelled to look beyond the relevant body of federal law to formulate an appropriate decisional rule.[50]

Third, several conceptual, policy and practical constraints caution against strict adherence to municipal rules of the foreign state in defining the scope of substantive rights and causes of action to be applied in adjudicating ATCA claims, and counsel instead a measure of flexibility, as reflected by the cases cited above, to enable the courts to fashion remedies compatible with the principles of federal common law and the content of universally recognized norms of international law.

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[47] 886 F. Supp. at 191 (citing the TVPA and its legislative history as supporting the court's approach); *see also* The Rules of Decision Act, 28 U.S.C. § 1652. The statute provides that: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

[48] *See Xuncax*, 886 F. Supp. at 191-92.

[49] 42 U.S.C. § 1983.

[50] 672 F. Supp. at 1547-48; *see also Marcos II*, 25 F.3d at 1476 (applying federal Eighth Amendment and Civil Rights Act decisional law in determining whether plaintiffs' cause of action extinguished on defendant's death); *Unocal*, 2002 WL 31063976, at *11 (applying international law principles to determine the liability of a private third-party for violations of international law).

Just as the sources from which universal norms of international conduct derive are often articulated as generalities or conclusory precepts, equally so many principles of the organic law of sovereign states are typically expressed in terms that are no less sweeping nor any more self-executing. Pronouncements recognizing fundamental rights governing the state's conduct in relation to its people are not always accompanied by corresponding promulgations of specific definitions and causes of action authorizing enforcement through private suits. In consequence, in their assessments of ATCA claims, courts looking to foreign municipal law are likely to encounter common situations, as experienced in the cases discussed above and by this Court in reviewing principles of Zimbabwe law in the matter at hand, that raise significant choice of law impediments to the application of the ATCA and hinder the furthering of the goals of international standards.

The municipal law, for example, may manifest general domestic recognition of a fundamental norm without specifically elevating it further into a defined private right of action. Local rules may also provide a remedy that may not suffice to adequately highlight and respond to the gravity of the conduct and the import of the case. Or else the foreign law may contain no relevant decisional rule at all. Or it may provide a standard that, if applied to adjudicate specific ATCA claims, would dispose of the case in a manner that would defeat a remedy consistent with fostering the purposes of federal and international law. As succinctly phrased by the *Xuncax* court: "Simply put, municipal law is ill-tailored for cases grounded on violations of the law of nations."[51]

This situation may prevail for several reasons. Even today—despite evidence of more widespread recognition of universal standards through the proliferation of international instruments among the many sovereign nations in the world, with their multiplicity of histories, cultures and customs, and diverse stages of development—there are many jurisdictions

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[51] 886 F. Supp. at 192.

in which the rule of law as we know it remains a relatively recent and still incipient adaptation. Thus, in these states the enunciation of substantive definitions, and elaboration of causes of action and corresponding decisional rules necessary to govern all aspects of the full range of mature, enforceable rights common in our jurisprudence, remain at various rudimentary stages, if they exist at all.

Another limitation inherent in placing undue reliance on municipal law of the foreign state in choice of law analysis is reflected in actions, such as the case at bar, that charge egregious misconduct by the sitting government itself through measures taken by the highest ranking officers of the regime. These are the very officials whose public duties encompass enacting, enforcing and construing domestic laws, and deciding the state's compliance with international norms. It is unlikely to escape the notice of government leaders who defile the powers of their offices by resorting to the barbarism of state-sponsored torture and murder, and to the brutalities characteristic of inhuman treatment of their nation's own people, to equally dishonor the municipal justice system and its laws in order to immunize themselves from accountability and liability for their wrongs. Doctrines such as absolute or qualified immunity for the state and government personnel, statutes of limitations, and definitions of state action and other exemptions, may be easily perverted by self-serving enactments specifically designed to shield the misconduct of the selfsame offenders whose deeds define the deviation from universal norms, thereby subverting international law. Were the federal courts obliged to give unremitting recognition and deference to the substantive laws and defenses compelled by municipal law under a choice of law analysis, in some instances such application of foreign law could frustrate the right of action the ACTA was designed to confer upon the victims of international lawlessness.

Moreover, as described above, well-established, universal, and obligatory norms defining rules of international conduct, evolve by custom and usages of nations over time. They are further elaborated by the works of reputable jurists and

scholars and settled through longstanding practice and application in judicial decisions recognizing and enforcing those rule.[52] In consequence, because customary international norms are not always fixed in codifications or treaties, not every nation will necessarily reflect clearly in its domestic jurisprudence principles that manifest its unequivocal assent and adherence to universal standards that may override municipal rules.

By the same token, under customary practice in many global bodies, the declarations, resolutions and covenants that embody international practices are adopted by consensus. This procedure, while giving some legitimacy to the content of the instrument as evidence of broad recognition, at times conceals the degree of unstated reservations or dissent among regimes that do not voice their objections and instead silently join the consensus in response to the pushes and pulls of internal and external social and political pressures. Accordingly, while it may be expedient for a state to refrain from objecting to the international community's promulgation of particular standards to govern relations among nations and their subjects, its tacit acceptance does not always translate into enactment of corresponding municipal law giving meaning and force to the generalities articulated in the instruments with which the state publicly associates itself.

Thus, a gap sometimes exists between the public concurrence the state professes abroad to norms of international conduct in their relations with the community of nations and the measures it actually adopts at home to enable its people to realize the benefits of those universal rules. It is not uncommon in international practice for states to pay lip-service homage to the promulgation of particular international instruments, and even to ratify binding covenants, but then delay or fail altogether to adopt the municipal implementing legislation necessary to give the enunciated

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[52] *See The Paquete Habana*, 175 U.S. at 700; *Filartiga I*, 630 F.2d at 880.

international rights meaningful domestic legitimacy and create an effective national means to vindicate them.[53]

For much of the same reasons, adjudication of claims that assert violations of customary international law and seek to vindicate universally recognized rights often engenders conceptual anomalies between the gravity of the offenses, the high promise conveyed in lofty terms by universally recognized rights, and the limited scope of available municipal remedies. Human rights offenses universally held to contravene the law of nations occupy the low ground reserved by civilized people to rank the most heinous of human behavior. Typically these wrongs are correspondingly branded in language employing the most profound opprobrium, fittingly portraying the depths of depravity the conduct encompasses, the often countless toll of human suffering the misdeeds inflict upon their victims, and the consequential disruption of the domestic and international order they produce. These expressions mark the high stakes enshrined by universally outlawed practices such as genocide; slavery; torture; summary execution; forced disappearance; war crimes and crimes against humanity.[54]

Between the horrid deeds these recognized atrocities proclaim, and the ringing words and promises with which they are universally condemned and renounced in solemn international instruments, lies a reality: that extant municipal law may not be available or may lag behind the need in providing adequate or readily accessible remedies to redress universally recognized wrongs, and that not infrequently, in

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[53] *See* Louis Henkin, *The Age of Rights* ix-x (1990) (noting that despite universal acceptance of the concept of international human rights, that consensus "is at best formal, nominal, perhaps even hypocritical, cynical," though still maintaining that even giving hypocrisy its due, it is the idea of human rights, to which no state has offered a preferable alternative, that has dominated the global community's debate and gained international currency in recent decades).

[54] *See generally Restatement of Foreign Relations*, *supra* § 702; Blum & Steinhardt, *supra* at 90-96.

the absence of any particular right of action specifically defined and promulgated to fit the real wrongs at hand, such means of relief as may exist are achieved only by Procrustean analogies that do not always capture or do justice to the actual grievousness associated with the offenses. Thus, for example, under municipal law of some jurisdictions, the magnitude of genocide and murder by torture and extrajudicial killing may have to be adjudged and remedied in accordance with ordinary civil tort standards prescribed in wrongful death statutes. Wholesale degradations and deprivations of all traces of human dignity perpetrated by cruel, inhuman or degrading treatment may be civilly prosecuted under local principles defining assault and battery or infliction of emotional distress. Forced disappearance and prolonged arbitrary detention may be classified as false imprisonment.[55]

To be sure, some aspects of international offenses may share elements with the ordinary municipal law torts. But, in practice, the acute form of misconduct entailed in international violations in many cases amounts to more than mere differences in degree, and assumes differences in kind so fundamental as to compel distinct treatment under universally recognized rules. The "enemy of all humankind", in legal if not in genetic terms, often ranks as a different species from the ordinary tortfeasor of the typical case.[56] Equally so is the class of universal rules that outcast the international outlaw, and thus declare him unworthy of all sovereign protections, distinguished from the global community's exhortations of aspirational norms or even from customary international law.[57]

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[55] *See, e.g., Xuncax*, 886 F. Supp. at 183, 200; *Filartiga II*, 577 F. Supp. at 865-66; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1357 (N.D. Ga. 2002).

[56] *See Filartiga I*, 630 F.2d at 890 ("[F]or the purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind.").

[57] *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715-16 (9th Cir. 1992) (describing the distinction under international law principles between peremptory norms (*jus cogens*),

The difficulties, as evidenced by the courts that have addressed the issues, arise not merely as a question of semantics that demean the international standards. Rather, the greater concern lies in potential results that could frustrate efforts to fashion relief commensurate with the real repugnance of international wrongs and their profound effects, in other words, remedies that do not vindicate and recompense the victims of state-sponsored genocide and murder as if they had suffered nothing more than common law defamation and battery.[58]

Tel-Oren, for example, involved what Judge Edwards characterized as a "barbaric rampage" in which terrorists took 121 civilians hostage and "tortured them, shot them, wounded them and murdered them," killing 22 adults and 12 children and seriously wounding 73 adults and 14 children, before police managed to stop the "massacre."[59] Although the dismissal of the case was sustained on substantive grounds, the district court had ruled alternatively that the action was also barred by the local one-year statute of limitations applicable to certain torts, such as assault and battery.[60]

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the obligations of which are binding on all states and from which there can be no derogation, and customary international law that derives from the consent of states).

[58] *See Mehinovic*, 198 F. Supp. 2d at 1359 (recognizing that under international law, compensation for a broad range of physical, emotional and social harms should be commensurate to the injury) (citing M. Whiteman, *Damages in International Law* 718-19 (1943)).

[59] 726 F.2d at 776 (Edwards, J., concurring).

[60] *See id.* at 799 n.2 (citing *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 550-51 (D.D.C. 1981); *cf. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, G.A. Res. 2391 (XXIII), 23 U.N. GAOR Supp. (No. 18), at 40, U.N. Doc. A/7218 (1968) Art. 1, *reprinted in International Instruments, supra*, Vol. I, Pt. 2 at 679 (declaring that no statutory limitation shall apply to bar the prosecution of war crimes and crimes against humanity irrespective of the date of their commission).

For the same reasons, other courts, in order to reflect the true magnitude of the universally recognized wrongs at issue and confer relief proportionate to the harms engendered, have felt compelled to pick and choose from among available remedial options one that advances the purposes of the ATCA and international law, in doing so sometimes ignoring constraints of municipal law to fashion relief even when the foreign law did not specifically recognize a remedy. The underlying decisional rules at issue in these cases have involved, for example, survival of a cause of action after defendant's death;[61] the right of a sibling of the victim to bring an action under the ATCA;[62] the applicable statute of limitations;[63] and punitive damages.[64]

A final drawback to a choice of law approach mandating strict adherence to municipal law in redressing international law violations in ATCA cases is the practical and jurisprudential complexities that inhere in discerning, construing and enforcing substantive rules of decision formulated by foreign courts, legislatives or administrative bodies.[65] The intricacies and challenges are compounded in ATCA adjudications by the integral links and interplay that exist between the application municipal and international law for both jurisdictional and decisional purposes. Though the Federal Rules of Civil procedures provide guidance for federal courts in applying

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[61] *See, e.g., Marcos II*, 25 F.3d at 1476.

[62] *See, e.g., Xuncax*, 886 F. Supp. at 191-92.

[63] *See, e.g., Forti I*, 672 F. Supp. at 1547-48; *see also Tel-Oren*, 726 F.2d at 799 n.2 (Bork, J., concurring) (noting that the district court had dismissed the case on the alternate ground that it was barred by the forum's statute of limitations for certain torts).

[64] *See, e.g., Filartiga II*, 577 F. Supp. at 865-66; *but see Xuncax*, 886 F. Supp. at 198, 201 (awarding punitive damages in connection with ATCA claims but denying them as regards municipal law claims on account of doubt as to whether recovery of such damages was permissible under the municipal law of Guatemala).

[65] *See Xuncax*, 886 F. Supp. at 183; *see also Tel-Oren*, 726 F.2d at 787 (Edwards, J., concurring).

foreign law,[66] this authority does not mitigate the conceptual and pragmatic obstacles always associated with in the task.

B. EMERGENCE OF FEDERAL COMMON LAW POST-FILARTIGA

In synthesis, the foregoing case law reflects the emergence of a set of decisional rules federal courts have crafted to give scope and content to the cause of action the ATCA creates as it relates to international human rights law. Under these principles, as regards to misconduct that violates universally recognized norms of international law, the cases suggest several standards to guide ATCA choice of law determinations: (1) the local law of the state where the wrongs and injuries occurred and the parties reside may be relevant and may apply to resolve a particular issue insofar as it is substantively consistent with federal common law principles and international law and provides a remedy compatible with the purposes of the ATCA and pertinent international norms;[67] (2) in the event the local law of the foreign state of the parties' residence and underlying events conflicts with federal or international law, or does not provide an appropriate remedy, or is otherwise inadequate to redress the international law violations in question, a remedy may be fashioned from analogous principles derived from federal law and the forum state, or from international law embodied in federal common law;[68] (3) should the application of law from federal and forum state principles as to some aspect of the claim defeat recovery, an analogous rule drawn from the municipal law of the foreign jurisdiction may be applied to the extent it supplies a basis for a decisional rule that may permit relief;[69] (4) if some part of the claim cannot be sustained as a violation of

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[66] *See* Fed. R. Civ. P. 44.1.

[67] *See Filartiga II*, 577 F. Supp. at 863.

[68] *See id.*; *Unocal*, 2002 WL 31063976, at *11; *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Marcos II*, 25 F.3d at 1476; *Xuncax*, 886 F. Supp. at 189-91; *Forti I*, 672 F. Supp. at 1547-48.

[69] *See Xuncax*, 886 F. Supp. at 191-92.

international law, a remedy might be found by application of the foreign state's municipal law under the federal court's pendent jurisdiction if so invoked.[70]

In essence, what these precedents represent is the natural evolution of common law, and the organic branching of federal substantive rules through the ATCA, which "established a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."[71] This growth of federal decisional law gives expression to the longstanding principle that the law of nations has always been part of federal law.[72]

As a body of federal law develops under this approach, so as to give content to an ATCA right of action and thus fill in the interstices with federal decisional rules, the federal courts' response acquires the virtues of uniformity and recognition of more diverse sources of substantive standards to draw upon in shaping remedies for adjudication of ATCA claims. The advantages of this approach were noted by the *Xuncax* court's observation that: "[b]y not tethering [the ATCA] to causes of action and remedies previously developed under roughly analogous municipal law, federal courts will be better able to develop a uniform federal common law response to international law violations, a result consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place."[73]

Finally, a recent Second Circuit explication of *Filartiga I* is consistent with a reading that in appropriate cases would permit a choice of law determination not necessarily

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[70] *See id.* at 194-97.

[71] *Abebe-Jira*, 72 F.3d at 848 (citing *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); *Filartiga I*, 630 F.2d at 887; *Xuncax*, 886 F. Supp. at 179-80; *see also Filartiga II*, 577 F. Supp. at 863.

[72] *See Filartiga II*, 630 F.2d at 885-86 (citing *The Nereide*, 13 U.S. (9 Cranch) 883, 422 (1815); *The Paquete Habana*, 175 U.S. at 700); *see also Kadic*, 70 F.3d at 246; *Wiwa*, 226 F.3d at 104-05.

[73] 886 F. Supp. at 182. (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

compelling dispositive application of foreign law where the municipal rule of decision may conflict with federal law or international standards. In *Wiwa*, the Circuit Court noted that under the choice of law analysis required by *Filartiga I*, the district court would determine whether international law, the law of the forum, *or* the law of the state where the events occurred should provide the substantive law to adjudicate the action.[74]

Wiwa acknowledges significant developments in the progression of international human rights law since *Filartiga I* was decided that affect the application of the doctrine enunciated by that case. Most significant of these advances was the enactment of the TVPA in 1991, which the *Wiwa* court construed as both ratifying the holding in *Filartiga I* and significantly carrying it further.[75] The court noted that the TVPA not only grants federal jurisdiction, but makes it clear that it creates liability under United States law for torture and extrajudicial killing, and extends its remedy not just to aliens but to any individual.[76] "The TVPA thus recognizes what was perhaps implicit in [the ATCA]—that the law of nations is incorporated into the law of the United States and that a violation of international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law."[77]

Implicit in all of these developments is that whatever virtue the *Lauritzen* choice of law analysis may have in the context of a maritime case, the evolution of international human rights law in the light of contemporary realities as reflected in the Second Circuit's recognition of these developments, points to the necessity of staking out a more flexible course in the determination of the substantive law to be applied in adjudicating ATCA cases. Against this more ample

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[74] 226 F.3d at 105 n. 12.

[75] *See id.* at 104.

[76] *See id.* at 104-05.

[77] *Id.* (citing H.R. Rep. No. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86)).

exposition of the considerations that guide its decision, the Court proceeds to conduct its choice of law inquiry as it pertains to Plaintiffs' ATCA claims.

C. CHOICE OF LAW ANALYSIS AND APPLICATION OF THE PERTINENT RULES OF DECISION

Having examined the pertinent provisions of the Zimbabwe Constitution and relevant legal doctrine called to the Court's attention in Plaintiff's submission,[78] the Court is persuaded that this authority, though not explicitly creating defined causes of action as to all claims, sufficiently proscribes wrongful conduct and protects substantive rights encompassing Plaintiffs' claims asserting (1) torture and extrajudicial killing, (2) cruel, inhuman or degrading treatment, (3) denial of political rights, and (4) systematic racial discrimination. The Court is not persuaded that a sufficient basis for recovery exists under international law for Plaintiffs' claims asserting uncompensated seizure of their property. However, Plaintiffs have also sufficiently established legitimate grounds for recovery on their expropriation claims under Zimbabwe law.

1. Torture and Extrajudicial Killing

In their Claims One and Two, Plaintiffs seek monetary relief under the TVPA and ATCA to redress the torture and extrajudicial killing of Metthew Pfebve, David Stevens and Tafuma Chiminya Tachiona. The Magistrate Judge found that these individuals had been subjected by an organized mob of ZANU-PF members to severe pain and suffering by means of

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[78] *See* Fed. R. Civ. P. 44 (In determining the content and meaning of the laws of a foreign country, a court may examine and consider "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidences"); *see also Overseas Dev. Disc. Corp. v. Sangano Constr. Co.*, 840 F.2d 1319, 1324 (7th Cir. 1988).

torture before being brutally murdered.[79] Specifically, the Magistrate Judge found as follows:[80]

a. Tapfuma Chiminya Tachiona

Tapfuma Chiminya Tachiona was a founding member of the [Movement for Democratic Change "MDC"], the National Youth Organizer for the MDC, and a close companion of Morgan Tsvangirai, the President of the MDC. On April 15, 2000, whole Mr. Chiminya was campaigning with Mr. Tsvangirai, a group of ZANU-PF supporters attacked them. Managing to escape, Mr. Chiminya drove injured colleagues to the hospital, after which he reported the incident to the police. On his way home from the police station, he and two other MDC supporters, Sanderson Makombe and Talent Mabika, were again stopped by ZANU-PF members, who began attacking them with knives and sticks. Mr. Makombe was able to escape through the window of the vehicle and hid in the nearby brush, but Mr. Chiminya and Ms. Mabika remained trapped inside the truck as the assailants continued to beat them. Mr. Chiminya was hit repeatedly in the head with the butt of a gun, according to Mr. Makombe. At that point, the assailants doused the vehicle with gas, causing the whole truck to go up in flames. The attackers then jumped in their vehicle and fled, soon after which Mr. Chiminya and Ms. Mabika managed to tumble out of the burning truck. Mr. Chiminya "was just like a ball of flames running across the tarred road," according to Mr. Makombe. He ran toward a field and collapsed, but died before Mr. Makombe could reach him.

b. David Yendall Stevens

David Stevens and his wife, Maria, owned a private commercial farm in Zimbabwe. Mr. Stevens was a known supporter of the MDC. On February 12, 2000, their farm was invaded by twenty-six ZANU-PF and ZNVA members and

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[79] *See Tachiona*, 216 F. Supp. 2d at 275.

[80] *See id.* at 270-74 (internal citations omitted).

supporters. After that initial invasion, there have been a number of incidents of violence. For example, on two occasions, several female farm workers were assaulted and on one occasion, one was raped. Complaints to the police went unheeded. ... On April 15, 2000, ZANU-PF and ZWVA members killed the Stevens' dog and abducted David Stevens and five others. All six were severely beaten and tortured, and Mr. Stevens was forced to drink diesel oil.

Several of Mr. Stevens' neighbors observed the kidnapping and attempted to come to his aid by following his abductors to the police station. Once there, they were taken hostage as well, bound with rope, and driven away in two different vehicles. The men were tortured in a variety of ways, including being burned with cigarettes; beaten on the soles of their feet; beaten with rods, rocks and iron bars; hit in the face; and whipped with a fan belt from a car. In addition, their legs were cut with knives and they were threatened with having their ears and testicles cut off. Mr. Stevens was summarily executed later that same day.

c. Metthew Pfebve

[O]n April 29, 2000, ZANU-PF supporters approached the Pfebve home wielding axes, spears, sticks, and stones. The Pfebve family ran in different directions. Metthew Pfebve's mother managed to run into the outhouse, but was eventually found and pelted with stones by the assailants. The plaintiff and his father were attacked with stones, sticks and fists, then dragged down the road. The plaintiff's father was eventually dropped unconscious on the road, suffering deep lacerations to his head and several broken fingers. Meanwhile, Metthew Pfebve was carried away by the assailants. He was found dead the next day, naked and lying in the middle of the road, approximately one and one-half kilometers from his home. He had been severely beaten. The plaintiffs allege that he was in all likelihood tortured prior to his death at or nearby a primary school which the defendant had turned into a torture camp.

To vindicate Plaintiffs' rights asserted in Claims One and Two, the Magistrate Judge recommended recovery of compensatory and punitive damages against ZANU-PF under both the TVPA and the ATCA. In *Tachiona III*, the Court adopted the Report's recommendation of damages with regard to Plaintiffs' claims of torture and extrajudicial killing under the TVPA.[81]

In considering Plaintiffs' Claims One and Two under the ATCA, the Court notes that the Zimbabwe Constitution contains provisions that explicitly prohibit both torture and extrajudicial killing. Article 12(1) states that "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offense of which he has been convicted."[82] Similarly, Article 15(1) declares in relevant part, with elaborations and exceptions not pertinent here, that: "No person shall be subjected to torture[.]"[83] To vindicate rights protected by these provisions, the Zimbabwe legal system establishes civil remedies for victims of certain unlawful deprivations of an individual's rights to life, person or property, as well as for infringements of dignity, reputation or liberty, committed by intentional conduct, including assault, extrajudicial killing and murder.[84] These remedies enable claimants to recover both compensatory and punitive damages from the wrongdoers. The Court finds this authority sufficient to sustain the Magistrate Judge's recommendation of awards under ATCA of compensatory and punitive damages on Plaintiffs' claims of torture and extrajudicial killing.

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[81] *See id.* at 267-68.

[82] Zimbabwe Const. Art. 12(1). The Zimbabwe Constitution was submitted as Attachment C of Affidavit of Kevin Laue, dated 27 September 2002 ("Laue Aff."), attached to Plaintiff's Memorandum of Law Addressing Choice of Law Analysis Applicable to their claims for Relief Under the Alien Tort Claims Act, dated October 7, 2002.

[83] *Id.* at Art. 15(1).

[84] *See* Laue Aff., ¶¶ 11, 12 and 13.

Plaintiffs point out that their claims for torture and extrajudicial killing were filed under both the ATCA and the TVPA. They therefore urge that in addition or alternatively the Court consider the damages Plaintiffs are entitled to recover under the TVPA as undifferentiated damages awarded under the ATCA as well. The Court agrees.

In enacting the TVPA to effectuate this country's commitments under the Torture Convention, Congress gave express definition to causes of action arising under United States law specifying substantive rights and protections of individuals to be free from state-sponsored torture and extrajudicial killing.[85] The Second Circuit has construed this Congressional mandate as embodying recognition that these actions, when committed by foreign states under color of law in violation of international law, "is 'our business,' as such conduct not only violates the standards of international law but also as a consequence violates our domestic law."[86] The Circuit Court thus not only gave expression to Congressional intent favoring the adjudication of TVPA claims in federal courts as a matter of United States policy, but also implicitly recognized that in considering the substantive law governing a cause of action invoking the TVPA the courts may apply federal law rights embodied in the TVPA's definitions of torture and extrajudicial killing to adjudicate the dispute.

The practical effect of this approach is to obviate the need, in connection with torture and extrajudicial killing claims asserted under the TVPA and the ATCA, to conduct and adhere to a strict choice of law analysis in accordance with *Filartiga I*, and to offer the courts the ability to apply substantive rights defined by federal law in cases where the law of the foreign state in question may be ambiguous, silent or even incompatible. To this effect, the Second Circuit noted in *Kadic* that: "[t]he [TVPA] permits [claimants] to pursue their claims of official torture under the jurisdiction conferred

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[85] *See* 28 U.S.C. § 1350 (statutory note); *Wiwa*, 226 F.3d at 104-05; *Kadic*, 70 F.3d at 245-46.

[86] *Wiwa*, 88 F.3d at 106.

by the [ATCA] and also under the general federal question jurisdiction of [28 U.S.C.] section 1331 . . . ."[87]

Accordingly, the Court adopts the Report's recommendation that Plaintiffs be awarded compensatory and punitive damages on their Claims One and Two for torture and extrajudicial killing under the TVPA and the ATCA.

2. Denial of Political Rights

Plaintiffs' Claims Three and Four under the ATCA assert violations of certain political freedoms: denials of the rights of association, assembly, expression and beliefs and of the right to run for political office and participate in the state's government. The Magistrate Judge recommended awards of compensatory and punitive damages with respect to these claims, finding that ZANU-PF systematically hounded its political opponents through repeated acts of terror and violence. According to the Magistrate Judge, ZANU-PF specifically targeted Plaintiffs' association with the Movement for Democratic Change ("MDC"), an opposition political party:

> MDC supporters were constantly harassed, peaceful assemblies were interrupted by mobs of ZANU-PF supporters attacking MDC supporters, assassination attempts were made on MDC candidates, and MDC supporters were killed.[88]

The freedoms of political association, speech, beliefs and participation that Plaintiffs assert are recognized in various international instruments. The Universal Declaration contains several provisions itemizing individual rights that go to the essence of a person's political expression and participation, including freedoms of thought and conscience; of opinion and expression; of peaceful assembly and association; and of

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[87] 70 F.3d at 246 (citing *Xuncax*, 886 F. Supp. at 178).

[88] *Tachiona III*, 216 F. Supp. 2d at 280-81.

participation in the government of the person's country.[89] Corresponding provisions are more particularized in the Civil and Political Rights Covenant.[90]

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[89] *See* Universal Declaration, *supra*, Arts. 2, 7, 18, 19, 20, 21, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 2-5. These provisions declare in pertinent part:

Art. 2:
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. . . .

Art. 7:
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any incitement to such discrimination.

Art. 18:
Everyone has the right to freedom of thought, conscience and religion. . .;

Art. 19:
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers;

Art. 20:
(1) Everyone has the right to freedom of peaceful assembly and association;

Art. 21:
(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

[90] *See* Political and Civil Rights Covenant, *supra*, Arts. 18, 19, 20, 21, 22, 25 and 26, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 27-30. The related provisions of the Covenant state in relevant part:

Art. 18:
1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Art. 19:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Art. 20:

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Art. 21:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Art. 22:

1. Everyone shall have the right to freedom of association with others . . .

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

None of these sources, or other authorities elaborating on the scope, content and practical application of these rights, offers a particular definition or explicit guidance as to whether and to what extent universal consensus exists concerning the kinds of deprivations of political rights that are cognizable as violations of customary international law. However, the Second Circuit has recognized the significance of the Universal Declaration in "specify[ing] with great precision the obligations of member nations under the [United Nations] Charter."[91] In this regard, the *Filartiga I* Court acknowledged scholarly opinion, which it cited favorably, for the view that the Universal Declaration "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international

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Art. 25:
Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Art. 26:
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

See also American Convention, *supra*, Arts. 12, 13, 15, 16, 23, 24, *reprinted in International Instruments*, *supra*, Vol. II at 9, 20, 22; African Charter, *supra*, Arts. 8, 9, 10, 11, 13, *reprinted in International Instruments*, *supra*, Vol. II at 333-34; European Convention, *supra*, Arts. 9, 10, 11, 14 *reprinted in International Instruments*, *supra* Vol. II at 77-78.

[91] *Filartiga I*, 630 F.2d at 883.

community."[92] Consistent with this proposition, the Circuit Court also noted that "several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law."[93] Thus, the elemental principles embodied in the Universal Declaration are not only repeatedly invoked by the international community in general pronouncements but have been adopted as part of the constitutions of many states around the world and as such are reflected concretely in applied organic law.

In considering with greater specificity the content and degree of universality accorded to the political rights at issue in the instant case, the Court must note that the world is characterized by fundamental diversity of political systems and established orthodoxies. A vast range of political thought and channels of expression exists around the globe. So, too, common tensions often prevail between individual and aggregate rights, and majorities versus minorities, on the one hand, and, on the other, the imperatives of maintaining territorial integrity, national security and internal public order, safety and health. Given these realities, the absence of a more particularized expression defining the precise contours of individual civil and political rights as customary international law is not surprising.

Nonetheless, as sources of guidance for what qualifies as internationally recognized norms relating to the political

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[92] *Id.* (quoting E. Schwelb, *Human Rights and the International Community* 70 (1964)).

[93] *Id.* (citations omitted). This opinion is supported as well by other commentators who have urged that, taken as a whole, the Universal Declaration, as supplemented and elaborated by other international human rights instruments and practices of states, through constant invocation, widespread acceptance and global recognition as an authoritative definition and construction of the content of human rights, has acquired the status of customary international law prohibiting the violation of any of the rights enumerated in the Universal Declaration. *See* Myers McDougal, Harold Lasswell and Lung-Chu Chen, *Human Rights and World Public Order* 273-74, 325-27 (1980).

rights Plaintiffs invoke, the Court may draw from general principles derived from international agreements, declarations and pronouncements on the particular subject, as well as from the general principles common to the world community's major legal systems.[94] In this connection, the Court considers relevant doctrine and expressions reflected in the *Restatement of Foreign Relations* and federal law principles, provisions of the Universal Declaration and the Civil and Political Rights Covenant, and interpretations and applications of these instruments by authoritative international and domestic bodies.

a. The Restatement of Foreign Relations

Reflecting the absence of greater particularity and universal understanding as to the civil and political rights encompassed within internationally recognized and obligatory norms, § 702 of the *Restatement of Foreign Relations* does not specifically enumerate denial of civil and political rights among the distinct state policies or practices that violate customary international human rights law. The Restatement § 702 lists as customary law the following violations of human rights: (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, and (g) a consistent pattern of gross violations of internationally recognized human rights. The Restatement notes that the human rights prohibitions enumerated in clauses (a) through (f) are peremptory norms (*jus cogens*) and are not subject to derogation in times of emergency.[95]

Nonetheless, in § 702(g) the Restatement identifies a general category of international human rights violations where, as a matter of policy, a state practices, encourages or

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[94] *See Filartiga I*, 630 F.2d at 883; *Restatement of Foreign Relations*, *supra* § 102.

[95] *See Restatement of Foreign Relations*, *supra* § 702; *id.* cmt. n and Reporters' Note 11.

condones "a consistent pattern of gross violations of internationally recognized human rights." [96] Among consistent patterns deemed "gross," the Restatement cites as examples: "systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged); . . . denial of freedom of conscience . . . ."[97]

Several observations about § 702(g) are notable and pertinent to the instant case. First, because each of the violations listed in clauses (a) through (f) stands alone as having already acquired the requisite universal acceptance and definition to qualify as customary international law, the reference in clause (g) to "internationally recognized human rights" must comprise a residual body of protections and violations that, though articulated in global human rights declarations and instruments, standing alone presumably may not as yet have attained the authority of customary international law when considered as isolated incidences, but may rise to acquire such status when they satisfy the two specified standards: being both part of a "consistent pattern" and "gross" violations. In *Kadic*, the Second Circuit considered a somewhat analogous situation. It ruled that certain atrocities involving rape, torture and summary execution attributed personally to the offender that ordinarily would require state action to qualify as violations of international law were cognizable under the ATCA without regard to state action insofar as they were committed in furtherance of misconduct, such as genocide or war crimes, that did constitute recognized *jus cogens* violations of international law for which private individuals may be held liable even absent state action.[98]

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[96] *Id.* at § 702(g).

[97] *Id.* cmt. m; *see also id.* Reporters' Note 10 (noting that " '[c]onsistent pattern of gross violations' generally refers to violations of those rights that are universally accepted and that no government would admit to violating as state policy," including political and civil rights such as those described above).

[98] 70 F.3d at 243-44; *accord Unocal*, 2002 WL 31063976, at *9.

This reading and application would also be consistent with analogous federal law principles which hold that wrongful conduct by federal or municipal government officials is not actionable as violating certain constitutional prohibitions unless the underlying actions constitute a custom, policy or practice or, in the case of other constitutional standards, demonstrates conduct sufficiently gross to comprise reckless disregard or deliberate indifference for human life.[99]

Second, an interpretation of clause (g) that would define the violations it encompasses by reverting back to those already enumerated in clauses (a) through (f) would be tautological and render clause (g) meaningless. Third, the underlying concept of clause (g) is consistent with that of clause (f). Racial discrimination as such is universally denounced as incompatible with international norms.[100] But under § 702(f) racial discrimination, when practiced, encouraged or condoned by the state, violates international human rights law only when it is "systematic".[101]

Expressions of a concept similar to that embodied in Restatement § 702(g), articulating international concern and condemnation of "gross and systematic" violations of fundamental human rights, are reflected in various international pronouncements.[102] As it pertains specifically to

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[99] *See Farmer v. Brennan*, 511 U.S. 825, 836 (1994); *Monell v. Dep't Soc. Servs.*, 436 U.S. 658, 690-91 (1978); *Bivens v. Six Unknown Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 393 (1971) ("An agent acting—albeit unconstitutionally—in the name of the United States possesses far greater capacity for harm than an individual trespasser exercising no authority other than his own."); *see also Unocal*, 2002 WL 31063976, at *34 (Reinhardt, J., concurring).

[100] *See, e.g.*, Universal Declaration, *supra*, Arts. 2, 7, *reprinted in International Instruments, supra*, Vol. I, Pt. 1, at 2-3; Convention on Racial Discrimination, *supra*, Arts. 1-8, *reprinted in International Instruments, supra*, Vol. I, Pt. 1, at 66-71.

[101] *Restatement of Foreign Relations, supra* § 702(g).

[102] *See e.g., Vienna Declaration and Programme of Action* (the "Vienna Declaration"), ¶ 80, U.N. Doc. A/CONF. 157/23 (1993) (expressing condemnation of various "gross and systematic

certain political rights, this principle is affirmed in the Proclamation of Teheran,[103] which declares that: "Gross denials of human rights arising from discrimination on grounds of race, religion, belief or expressions of opinion outrage the conscience of mankind and endanger the foundations of freedom, justice and peace in the world."

b. The Civil and Political Rights Covenant

The Civil and Political Rights Covenant does offer greater specific definition and guidance with regard to the freedoms here in question. It makes clear that even if perhaps not all of the civil and political rights enunciated in the Universal Declaration may garner global recognition satisfying the requisite standards of universality and specificity, and thus qualify as customary international law, not all of the proclaimed rights necessarily stand on the same footing. In fact, the Covenant itself manifests that some universal human rights already have attained sufficient definition and recognition among the individual freedoms that are entitled to protection as peremptory norms. The listing includes proscriptions concerning: the right to life (Art. 6); freedom from torture (Art. 7) and slavery (Art. 8); imprisonment for debt (Art. 11); criminal convictions under *ex post facto* laws

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violations and situations that constitute serious obstacles to the full enjoyment of all human rights . . ."); *Beijing Declaration and Platform for Action* (the "Beijing Declaration"), ch. IV.E. ¶¶ 114, 131, U.N. Doc. A/CONF. 177/20 (1995) (same, and specifically referencing "systematic rape"). The Vienna Declaration was adopted by the World Conference on Human Rights on June 25, 1993. *See* Vienna Declaration, *supra*, Note by the Secretariat. The Beijing Declaration was adopted by the Fourth World Conference on Women on September 15, 1995. *See* Beijing Declaration, *supra*, Resolution 1.

[103] *See Proclamation of Teheran, Final Act of the International Conference on Human Rights* (the "Proclamation of Teheran"), ¶ 11, U.N. Doc. A/CONF. 32/41 at 3 (1968), *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 51-54. The Proclamation of Teheran was adopted by the International Conference on Human Rights at Teheran on May 13, 1968. *See International Instruments*, *supra*, Vol. I, Pt. 1, at 51.

(Art. 15); and the right to recognition as a legal person (Art. 16).[104] Article 4(2) specifically enumerates the right to freedom of thought, conscience and religion enunciated in Article 18 among the provisions of the Covenant that are not subject to derogation in time of public emergency, and is thus accorded special rank among those standards that have acquired firm standing as customary international law.[105]

Moreover, Article 18(3) of the Covenant articulates specific standards clearly defining the scope of freedom of thought, conscience and religion and the circumstances under which interference with exercise of these rights may be permissible. In particular, no restraints are allowed on these freedoms as such; Article 18(3) of the Covenant recognizes limitations only on a person's freedom to manifest his religion or beliefs, and then only insofar as such restrictions "are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[106]

A very similar framework defining the bounds of restraints on exercise of the right to freedom of opinion and expression is contained in Article 19. First, Article 19(1) recognizes the right of every person to hold opinions without interference. The right is expressed in absolute terms, with no permitted infringements. Freedom of expression, on the other hand, is made subject to specific limitations, but only as provided by law and necessary (a) for respect of the reputations or rights of others, or (b) for the protection of national security, or of public order, or of public health or morals.[107]

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[104] *See International Instruments, supra*, Vol. I, Pt. 1 at 22, 23, 25, 27; *see also Restatement of Foreign Relations, supra* § 702, cmt. n.

[105] *See International Instruments, supra*, Vol. I, Pt. 1 at 22.

[106] *Id.* at 27; *see also* Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms, published in The International Bill of Rights, supra* at 212.

[107] *See International Instruments, supra*, Vol. I, Pt. 1, at 28. Article 19(3)(a) and (b) add respect for the reputations of others and protection of national security to the grounds permitting limitations on freedom of expression. These concerns are not mentioned in

So structured, freedoms of thought, conscience and religion, and the related freedoms of opinion and expression,[108] may be regarded as ordered on a higher plane on the scale of universal acceptance and definition, and thus vested with a higher grade of protection, than associational and participatory rights such as freedom of association, assembly and political participation in government, each of which is subject to many more practical constraints associated with other public imperatives.[109]

Article 18(3) as regards freedom of thought, conscience and religion. *See id.* at 27-28.

[108] By placing freedom of thought and freedom of opinion in separate Articles, the Covenant seems to imply a distinction between them. Any difference is tenuous. For, "thought" may include not only religious belief but social and political conceptualization as well. *See The International Bill of Rights*, *supra* at 214. One commentator endeavored to describe the nuances as follows: "[T]here are no clear frontiers between 'thought', and 'opinion'; both are internal. 'Thought' is a process, while 'opinion' is the result of this process. 'Thought' may be nearer to religion' or other beliefs, 'opinion' nearer to political convictions. 'Thought' may be used in connection with faith or creed, 'opinion' for convictions in secular and civil matters." *Id.* at 217.

[109] As regards the rights of peaceful assembly, of association with others, and of participation in political affairs, Articles 21, 22 and 25 of the Covenant elaborate other qualifications that clearly manifest the hierarchy of the arrangement among these various civil and political rights. *See International Instruments*, *supra*, Vol. I, Pt. 1, at 28-20. As in Articles 18 and 19, limitations are placed by Articles 21 and 22 on exercise of the rights of peaceful assembly and association; any interference is subject to the condition that the restriction be "necessary" in connection with the specified public purposes. Articles 18 and 19, however, require that any limitation on freedom to manifest beliefs or religion, as well as exercise freedom of expression, must be necessary to "protect" public safety, order, health or morals. *Id.* at 27-28. Articles 21 and 22, on the other hand, provide that the interference must be necessary "in a democratic society" and "in the interests" of national security or public safety or public order. Moreover, Article 21 differs in that restrictions are permitted if "imposed in conformity with law," as opposed to the apparently stricter standard of "prescribed" or "provided" by law that is employed in other formulations of the

On this point, the Preamble of the Universal Declaration itself eloquently affirms that "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."[110] For, internal intrusions into the workings of the mind in formulating thought and opinion, and on their manifestations as beliefs and legitimate expression, may be inherently more invasive and perverse, and thus may be more fundamentally harmful to the individual and society, than some external restraints affecting an individual's associational and participatory political rights.[111] The *Restatement of Foreign Relations* also implicitly acknowledges the special significance of the person's mental freedoms in its specific mention of denial of freedom of conscience among its illustrations of the violations

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limitation. *Id.* at 28. These modifications would have the effect of rendering the recognition of freedoms associated with manifestation of beliefs and expression more rigorous as well as more broadly based.

By way of further contrast evidencing the distinctions and priorities built into the Covenant's hierarchical order, the rights of participation in political affairs set forth in Article 25 are not subject to the strict standards reflected in the "prescribed" or "provided" by law and "necessary" formulations that apply to the rights contained in Articles 18, 19, 21 and 22. Rather, these participatory rights are qualified by a far more ample and flexible condition that any restriction on them not be "unreasonable." *Id.* at 29-30.

[110] *International Instruments*, *supra*, Vol. I, Pt. 1 at 1.

[111] *See* Civil and Political Rights Covenant, *supra*, Arts. 19, 21, 22, 25 *International Instruments*, *supra*, Vol. I, Pt. 1 at 28-30 (categorically delineating a "right to hold opinions without interference" while providing for "reasonable" and "necessary" restrictions on rights to freedom of peaceful assembly, association and public governance and election); *see also International Bill of Rights*, *supra* at 217 ("The right to hold opinions may be seen as a special aspect of the right of privacy dealt with in Article 17 [of the Covenant], but there only arbitrary and unlawful interferences are prohibited; the privacy of thought and opinion is subject to no interference whatever.").

of internationally recognized human rights that would fall within the proscription of § 702.[112]

Similar recognition of the unique value, and the priority among human rights norms, vested by the Civil and Political Rights Covenant in freedom of conscience, thought, opinion and expression is also conveyed in other authoritative sources and scholarly views. The Supreme Court has described freedom of opinion and expression as "the matrix, the indispensable condition of nearly every other form of freedom."[113] These freedoms have also been characterized as "the 'touchstone of all the freedoms to which the United Nations is consecrated.' "[114]

Article 2 of the Universal Declaration embodies this recognition by placing enjoyment of rights and freedoms without discrimination based on "political or other opinions" on par with other impermissible distinctions, such as race, color, sex, language, religion and national or social origin.[115] This provision is reinforced by the affirmative prescriptions set forth in Article 7, which recognize every person's right to equal protection of the law against any form of discrimination or incitement to discrimination, and in Article 19, which specifically enunciates the "right to freedom of opinion and expression," including "freedom to hold opinions without interference . . . ."[116]

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[112] *See Restatement of Foreign Relations*, *supra* § 702, cmt. m.

[113] *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

[114] McDougal, Lasswell and Chen, *supra* at 700-01 (quoting *Annotations on the Text of the Draft International Covenants on Human Rights*, 10 U.N. GAOR, Annexes (Agenda Item No. 28) at 50, U.N. Doc A/2929 (1955)). *See also The International Bill of Rights*, *supra* at 216 ("It is an old commonplace that freedom of opinion and expression is one of the cornerstones of human rights and has great importance for all other rights and freedoms.").

[115] *See International Instruments*, *supra*, Vol. I, Pt. 1 at 2.

[116] Universal Declaration, *supra*, Art. 19, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 4; *see also* Civil and Political Rights Covenant, *supra*, Arts. 2(1), 26, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 21, 26; African

These longstanding, consistent, widely recognized expressions uniformly convey a basic principle that "[t]he differential treatment of individual human beings entirely on the basis of political and other opinions is clearly incompatible with the values of human dignity."[117] Beyond its political and moral grounding, this precept also possesses other utilitarian value insofar as "abundant production and wide sharing of all values are profoundly affected by the degree to which the members of a community enjoy freedom of opinion."[118]

c. Recognition by Courts and Other Adjudicatory Bodies

The level of the recognition and definition accorded to the rights to freedom of thought and beliefs and of opinion and expression as binding international norms is reflected in official interpretations and applications of the relevant provisions of the Civil and Political Rights Covenant by various international courts and adjudicatory bodies. These authorities uniformly reaffirm three essential principles that define and embody the specific content of these rights: (1) that the right to enjoy and exercise these freedoms is a fundamental and obligatory international norm; (2) that any interference with the exercise of these rights may be justified only (a) when provided by law, (b) when the restraint is necessary to protect essential rights of others or to further vital public purposes grounded on national security, public order, safety, health or morals, and (c) when the interference is proportionate to the legitimate aims pursued; and (3) that violation of these standards is actionable and compensable in damages to the victims.

Charter, *supra*, Art. 2, *reprinted in International Instruments*, *supra*, Vol. II at 331; American Convention, *supra*, Art. 13, *reprinted in International Instruments*, *supra*, Vol. II at 19; European Convention, *supra*, Art. 14, *reprinted in International Instruments*, *supra*, Vol. II at 78; Proclamation of Teheran, *supra* ¶ 5, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1 at 52.

[117] McDougal, Lasswell and Chen, *supra* at 697.

[118] *Id.* at 697-98.

These principles emerge from rulings rendered by the United Nations Human Rights Committee in the course of carrying out its adjudicatory role under the *Optional Protocol to the Civil and Political Rights Covenant* (the "Optional Protocol").[119] These authoritative interpretations and applications of the Covenant reflect an index of the scope of the global community's recognition and acceptance of the principles of the Covenant in this regard as obligatory. In *Aduayom v. Togo*,[120] for example, the Human Rights Committee considered a claim under Article 19 of the Civil and Political Rights Covenant brought by a group of authors who were arrested and suspended from their public employment for various political offenses, including possession of pamphlets and other documents critical of the government of Togo and outlining the organization of a new political party. The Committee determined that the Togo government's refusal to reinstate the claimants to their jobs and compensate for lost wages constituted a violation of Article 19's right to freedom of political opinion and expression for which the state had provided no justification pursuant to any of the exceptions recognized under Article 19(3). In so ruling, the Committee observed that:

> the freedom of information and expression are cornerstones in any free and democratic society. It is on the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their governments without

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[119] *See* G.A. Res. 2200 A(XXI), U.N. Doc. A/6316 (1966), *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 44-45. As of August 21, 2002, of the 156 state signatories of the Civil and Political Rights Covenant, 107 had signed and 102 had acceded to the Optional Protocol. *See Status of Ratifications of the Principal International Human Rights Treaties*, at *http://www.unhchr.ch/pdf/report.pdf* (August 21, 2002).

[120] 1 B.H.R.C. 653 (1996).

fear of interference or punishment, within the limits set by [A]rt. 19(3).[121]

Decisions in a similar vein construing the freedom of conscience, opinion and expression provisions of the European Convention,[122] which parallel those of the Civil and Political Rights Covenant, have been rendered by the European Court of Human Rights, as well as by some national courts. In *Surek v. Turkey*,[123] the European Court found a violation of Article 10 of the European Convention in the conviction and sentencing of two journalists for publication of

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[121] *Id.* at ¶ 7.4; *see also Ross v. Canada*, 10 B.H.R.C. 219, ¶¶ 11.1-11.6 (U.N. H.R. Cmtee 2000) (finding no violation of Article 19 of the Covenant where the state demonstrated that the challenged interference with freedom of expression satisfied the standards set forth in Article 19(3), in that the restriction was imposed by law and did not go farther than necessary to achieve a legitimate protective function); *Faurisson v. France*, 2 B.H.R.C. 1, ¶¶ 9.1 - 10 (1996) (same); *HKSAR v. Ng Kung Siu*, 6 B.H.R.C. 591 (Hong Kong Ct. App. 1999) (finding a violation of Article 19(3) in the conviction of a defendant under a national flag ordinance for defacing a flag during a peaceful demonstration).

[122] Article 10 of the European Convention provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

International Instruments, *supra*, Vol. II at 77.

[123] 7 B.H.R.C. 339, ¶¶ 57-64 (Eur. Ct. H.R. 1999).

interviews with the leader of a Turkish separatist organization that was declared illegal under national law, where there was no evidence that the political opinions expressed in the interviews could be construed as incitement to violence and the state action could not otherwise be justified as necessary under the exceptions of Article 10(2) of the Convention, a provision the court noted must be strictly construed.[124] Among the essential premises the court reaffirmed in its determination, which awarded compensatory damages to the claimants, was that freedom of expression constitutes "one of the basic conditions . . . for each individual's self- fulfillment."[125]

It follows from the interpretation and application given by these international bodies and national courts to the exercise of freedom of political opinion and expression that if the state violates the right when it employs its legal process to prosecute and punish individuals who profess views at odds with the government's orthodoxy, it would contravene those fundamental human rights principles and ends even more readily in instances where the state resorts to utter violence and lawlessness as the means to commit the internationally proscribed offenses. Hence, a systematic campaign of terror and violence conceived and arbitrarily waged by state agents arising not from any legitimate response to a demonstrable need related to the protection of public order, health or safety or other imperative governmental purpose, but rather hatched and calculated to suppress political opinion and expression, is neither provided by law, necessary to safeguard other vital rights or public purposes, nor proportionate to any justifiable state aims pursued. When accompanied by extreme deprivations of life and liberty and unwarranted invasions of privacy as the instruments employed to achieve these repressive ends, the state's actions present unique dimensions that should qualify under a standard requiring a consistent

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[124] *Id.* ¶ 57.

[125] *Id.*; *see also Redmond-Bate v. Dir. of Pub. Prosecutions*, 7 B.H.R.C. 375, ¶ 20 (High Ct., Qns. Bench 1999) (same).

pattern of gross violations of internationally recognized human rights.[126]

d. Application to the Case At Bar

Here, the infringements committed by ZANU-PF of Plaintiffs' rights of freedoms of political belief, opinion and expression were sufficiently systematic and gross to warrant a finding of a violation of international law and corresponding liability, as well as an award of consequential damages under the ATCA in accordance with the Magistrate Judge's recommendations in this case.

Undoubtedly, states may differ on the general content of certain political freedoms and the depth of their commitment to protect them. Their practices may vary as to the scope of the state's obligations to initiate defined measures to ensure meaningful exercise by their nationals of political rights universally recognized. And while nations may concede certain wrongful human rights practices as culpable excesses, or deny the existence of alleged violations of certain individual freedoms as grounded on legitimate political particularities of sovereign states, or as not supported by pertinent facts, few would justify or defend by legally supportable reasons that, as a matter of domestic or international law, a sufficient mandate exists for a state, as a means of advancing valid public purposes, to engage in an affirmative campaign of systematic harassment, egregious organized violence and terror, and arbitrary invasions of

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[126] The United States Foreign Assistance Act of 1961 bars assistance to the government of "any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person . . . ." 22 U.S.C. § 2151n(a). *See also* 22 U.S.C. § 2304; International Financial Assistance Act of 1977, 22 U.S.C. § 262d (expressing United States policy to oppose assistance to such governments by international financial institutions).

individual life, liberty and privacy specifically intended to deprive its people of freedoms of political thought, conscience, opinion and expression. This standard should govern especially where, as here, these rights are professedly recognized by the state's own organic law and avowed by the state as universal norms it has pledged to confer, honor and protect.[127]

It is true that under certain exigencies threatening safety, security or public order, the state may justifiably impose reasonable restraints on the exercise of these freedoms.[128] Article 19(3) of the Civil and Political Rights Covenant expressly recognizes that exercise of freedom of expression is subject to restrictions. But the exception, strictly construed by the authorities that have ruled on it, are circumscribed by the limitations. There is no evidence in this case of the existence of any public emergency officially proclaimed, or any necessity of national security or public order, that may have presented even colorable grounds to justify the state's actions as a warranted derogation from its obligations to ensure Plaintiffs' rights.[129]

Another consideration may weigh in the balance of gradations that may tip the measure of misconduct into the more severe scale deemed sufficiently gross or systematic for the purposes of assessing state violations of internationally recognized standards. In general, sovereign hypocrisy and cynicism, manifest in a state's failure to invest its domestic law and justice system with substance and force enough to enable its citizens meaningfully to exercise internationally recognized civil and political rights the state itself publicly

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[127] Zimbabwe is a signatory of the United Nations Charter, the Civil and Political Rights Covenant and the African Charter. (Laue Aff., ¶ 15.)

[128] *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666-67 (1925); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

[129] *See* Civil and Political Rights Covenant, *supra*, Arts. 4(1), 4(2) and 19(3), *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 22, 28.

embraces, may not suffice by itself to comprise a violation of universal norms. But hypocrisy exposed and materialized in the power of the state committed to organized brutality and violence inflicted against its own people and specifically calculated to deny political freedoms of conscience, opinion and expression the state itself ostensibly has conferred, may be a different matter. For, when the state undertakes to give expression and force of law not to foster the protection of fundamental human rights it publicly proclaims, but rather to execute systematic denials of those freedoms, the action may cross over the imprecise line and assume the added dimension of virulence necessary to transgress into the domain of what qualifies as a pattern of gross violations of universal norms.

By affirmatively unleashing a consistent pattern of violence and terror upon people led to believe, by the state's own domestic and international pronouncements, that those rights were theirs to enjoy, naked cynicism then not only substantiates the state's public deception in not sufficiently safeguarding those human rights, but may compound a failure to act that by itself may not be cognizable under one measure of illegality into a fury of affirmative wrongs and injuries actionable under another. This consideration is similar, albeit in a different context, to the principle of the common law of torts that a state may not be held liable for taking no action to enact remedial measures to address a potentially harmful condition it has no duty to correct, but may be found responsible for injuries when its agents do interject themselves into the situation and undertake related actions in the course of which they do not exercise the requisite standard of care the circumstances demand.[130] In the final analysis, when a state not only so eviscerates its own duty to ensure fundamental domestic and internationally recognized human rights as to render them nothing more than a hollow formalism, but also itself intentionally perpetrates gross violations of those very rights, the resulting combination of harms crosses the

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[130] *See, e.g., Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055-56 (2d Cir. 1990); *Sorichetti v. City of New York*, 482 N.E.2d 70, 74-75 (N.Y. 1985).

threshold of individual protections prevailing under universally recognized human rights norms.

On the basis of the preceding considerations and analysis, the Court concludes that Plaintiffs have established a violation of an internationally recognized norm to a right of freedom of political beliefs, opinion and expression without arbitrary and unjustified interference by the state.

e. Zimbabwe Law

The Court also notes that apart from the status of the political freedoms Plaintiffs assert under international law, these rights are also recognized under Zimbabwe law, although the scope of a municipal cause of action for monetary damages to vindicate these rights is somewhat ambiguous. The Zimbabwe Constitution contains explicit guarantees and prohibitions safeguarding freedoms of expression, of conscience, and of assembly and association.[131] Specifically, these rights are defined to proscribe that no person shall be hindered in the enjoyment of "freedom to hold opinions and to receive and impart ideas and information without interference,"[132] as well as the "right to assemble freely and associate with other persons and in particular to form or belong to political parties . . . or other associations for the protections of his interests."[133]

Under the foregoing provisions, a private action ordinarily does not exist to recover monetary compensation for violations of the specified rights, except that persons aggrieved by the unlawful conduct, including decedents' spouses and dependents, may be entitled to sue for damages where the wrong is also founded on a cause of action that falls within principles such as those comprising common law assault, torture or wrongful death.[134] The Court construes

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[131] *See* Zimbabwe Const. Arts. 11, 20, 21; Laue Aff., ¶ 14.

[132] Zimbabwe Const. Art. 20(1).

[133] *Id.* Art. 21(1).

[134] *See* Laue Aff., ¶ 14.

these provisions as sufficient to warrant a finding of liability and an award of compensatory damages to Plaintiffs with respect to ZANU-PF's violations of Zimbabwe law.[135]

As the Magistrate Judge determined here, an analogous basis for liability exists under federal law for violations of First Amendment rights, which include freedoms of speech, assembly, protest and association.[136] Insofar as the Court has determined that Plaintiffs' injuries resulted from violations of the law of nations also recognized under federal law, Plaintiffs are entitled to compensation under the ATCA.

On the basis of the foregoing authority, the Court adopts the Magistrate Judge's recommendation to award compensatory damages and punitive damages with regard to Plaintiffs' Claims Three and Four.

3. Cruel, Inhuman or Degrading Treatment

Plaintiff's Claim Five describes ZANU-PF's acts of cruel inhuman or degrading treatment. The Magistrate Judge recommended an award of compensatory and punitive damages with respect to this claim. The wrongful conduct upon which the Magistrate Judge found liability, encompasses:[137]

- The suffering of Tapfuma Chiminya, Mathew Pfebve, and David Stevens, prior to their death, including being bound and gagged and forced to ride in a vehicle for hours, being dragged down the street in front of neighbors and loved ones, and being placed in fear of impending death;

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[135] However, there is no indication in the materials presented to the Court as to whether punitive damages could be awarded under Zimbabwe law with regard to a violation of these political rights.

[136] *See Tachiona III*, 216 F. Supp. 2d at 280 (citing *Petramale v. Local No. 17 of Laborers Int'l Union of N. Am.*, 847 F.2d 1009, 1013 (2d Cir. 1988), and *Phillips v. Bowen*, 115 F. Supp. 2d 303, 306 (N.D.N.Y. 2000), *aff'd*, 278 F.3d 103 (2d Cir. 2002)).

[137] *See Tachiona III*, 216 F. Supp. 2d at 281.

- The suffering of Efridah Pfebve, who had watched her elderly mother being stoned by an angry mob, saw her brothers and elderly father being dragged down the street and beaten, and observed her home being ransacked; and
- The harms to Evelyn Masiti and Elliot Pfebve, who lived in constant threat of death by defendant and suffered repeated attacks upon their persons, families and property.

a. International Law

Other courts which have considered the issue have expressed divergent views as to whether cruel, inhuman or degrading treatment, though broadly expressed and accepted in the abstract as an international norm, possesses the requisite elements of universality and specificity to constitute a recognized proscription under the customary law of nations. In *Forti v. Suarez-Mason*,[138] for example, the court sustained its earlier dismissal of a claim of cruel, inhuman or degrading treatment upon concluding that there was not a sufficiently universal consensus defining the content of the prohibited conduct as a distinct international tort so as to be actionable under the ATCA.

The *Xuncax* court, however, reached a different result.[139] The court did note that the prohibition against cruel, inhuman or degrading treatment poses more complex definitional problems than other recognized international norms. Nonetheless, the court concluded that "[i]t is not necessary for every aspect of what might comprise a standard . . . be fully defined and universally agreed before a given action meriting the label is clearly proscribed under international law . . . ."[140] It then held that any conduct proscribed by the United States Constitution and by a cognizable principle of international law

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[138] 694 F. Supp. 707, 711-12 (N.D. Cal. 1988) ("*Forti II*").

[139] *See Xuncax*, 886 F. Supp. at 186-87.

[140] *Id.* at 187.

falls within the scope of cruel, inhuman or degrading treatment and is thus actionable under the ATCA.[141]

Other courts have expressed no reservations in accepting cruel, inhuman or degrading treatment as a "discrete and well recognized violation of international law," and a separate ground for liability under the ATCA, at least insofar as the unlawful conduct in question would also violate the Fifth, Eighth and/or Fourteenth Amendments to the United States Constitution.[142]

Grounds for doubts as to the scope of consensus and definitional content of the prohibition against the cruel, inhuman or degrading treatment arise by reason of ambiguous evidence of what unlawful conduct falls within the ascertainable contours of the action, beyond the bounds of what is already accepted as encompassed by prohibitions of torture, summary execution and prolonged arbitrary detention.[143] The conceptual difficulties are compounded because while the experts concur as to the existence of the norm, they offer little analytic guidance helpful in charting its precise frontiers as distinct wrongful conduct.[144] Thus, while most international declarations and covenants that proscribe torture also extend by conjunction to cruel, inhuman or degrading treatment or punishment,[145] those instruments

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[141] *Id.*

[142] *Jama v. United States Immigration and Nat. Serv.*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998); *Mehinovic*, 198 F. Supp. 2d at 1347-48 (citing *Abebe-Jira*, 72 F.3d at 847; *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1362 (S.D. Fla. 2001)).

[143] *See Forti I*, 672 F. Supp. at 1543; *Xuncax*, 886 F. Supp. at 186.

[144] *See Forti II*, 694 F. Supp. at 711-712.

[145] *See, e.g.*, Universal Declaration, *supra*, Art. 5, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 2 ("[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the "Torture Declaration"), Art. 1, G.A. Res. 3452, U.N. Doc. A/10034 (1975), *reprinted in International Instrument*, *supra*, Vol. I., Pt. 1, at 290 ("Any act of

contain specific definitions of torture but not of cruel, inhuman or degrading treatment.[146]

Despite the absence of a distinct definition for what constitutes cruel, inhuman or degrading treatment, various authorities and international instruments make clear that this prohibition is conceptually linked to torture by shades of misconduct discernible as a continuum. The gradations of the latter are marked only by the degrees of mistreatment the victim suffers, by the level of malice the offender exhibits and by evidence of any aggravating or mitigating considerations that may inform a reasonable application of a distinction. Several courts and other authorities have recognized that: "[g]enerally, cruel, inhuman or degrading treatment includes acts which inflict mental or physical suffering, humiliation, fear and debasement, which do not rise to the level of 'torture' or do not have the same purposes as 'torture'."[147]

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torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity[.]"); Civil and Political Rights Covenant, *supra*, Art. 7, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 23 ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."); African Charter, *supra*, Art. 5, *reprinted in International Instruments*, *supra*, Vol. II at 332 (same); European Convention, *supra*, Art. 3, *reprinted in International Instruments*, *supra*, Vol. II at 74 (same); *Restatement of Foreign Relations*, *supra* § 702 (same).

In *Xuncax*, the court noted that the provisions of the Torture Convention relating to torture are more explicit and forceful than those describing cruel, inhuman or degrading treatment. 886 F. Supp. at 186 n.33. While that Convention defines "torture," it contains no explicit definition of cruel, inhuman or degrading treatment. Moreover Article 14 prescribes that every member state ensure in its legal system that victims of torture obtain redress and have an enforceable right to fair and adequate compensation. In contrast, Article 16 commits states only to undertake to prevent other acts of cruel, inhuman or degrading treatment that do not amount to torture. *See id.*

[146] *See, e.g.*, Torture Declaration, *supra*, Art. 1, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 293-94.

[147] *Meninovic*, 198 F. Supp. 2d at 1348; *see also id.* (" '[T]orture is at the extreme end of cruel, inhuman or degrading treatment.' ")

That it may present difficulties to pinpoint precisely where on the spectrum of atrocities the shades of cruel, inhuman, or degrading treatment bleed into torture should not detract from what really goes to the essence of any uncertainty: that, distinctly classified or not, the infliction of cruel, inhuman or degrading treatment by agents of the state, as closely akin to or adjunct of torture, is universally condemned and renounced as offending internationally recognized norms of civilized conduct. Nor should the challenges of drawing distinctions deter from the task of supplying content drawn from real experience. It is well to recall that among the major sources of customary international law are judicial decisions rendered on the specific subject, rulings that may illuminate the meaning of particular standards, manifest guidance as to the course of the law and measure the breadth and strength of international consensus with regard to a given behavioral norm.

Like the growth of the common law, universally recognized norms ripen into settled law incrementally by the accretions of teachings informed by real events. Insofar as actual cases offer proper opportunities to resolve doubts and fill in gaps, the natural evolution of the law will be advanced by the authorized and principled exercise of judicial jurisdiction to decide them. Conversely, where uncertainty persists by dearth of precedent, declining to render decision that otherwise may help clarify or enlarge international practice, and thereby foster greater understanding and assent regarding the content of common behavioral rules, creates a self-fulfilling prophecy and retards the growth of customary international law. Accordingly, following the reasoning and guidance of the courts that have applied the standard, this Court finds that the unlawful conduct the Magistrate Judge described as grounds for liability and damages under Plaintiffs' Claim Five

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(quoting *Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 101 Senate Exec. Rep. 30, at 13 (1990)); Torture Declaration, *supra*, Art. 1(2) *International Instruments*, *supra*, Vol. I, Pt. 1, at 290 ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.").

constitutes cruel, inhuman or degrading treatment prohibited under principles of international law.

Though clearly there are areas of overlap insofar as the more aggravated torture misconduct ordinarily would also encompass cruel, inhuman or degrading of treatment, there are also instructive differences that offer guidance as to some proper demarcations. As may have occurred in the instant case, a victim who has been tortured and dies from the assaults, and whose corpse is then dragged through the streets by the assailants, at that point is conceptually no longer himself personally a subject of torture or even cruelty. The notion of inflicting severe pain and suffering on the dead is a tautology. But life's veneration of life does not end at the grave; death does not extinguish organized society's reverence for human dignity or the law's recognition of all aspects of life's experience; nor does it diminish protection against life's degradation. Throughout the ages, in almost every culture, civilization has embodied rites with emblems and taboos signaling that the dignity of the human body is worthy of safeguards against desecration even after death. To that end, laws, customs and practices generally define separate classes of offenses whose focal wrong is not the conscious infliction of physical pain and suffering on the living, but the hurt perpetrated upon the living by the defiling of the dead.[148]

By any measure of decency, the public dragging of a lifeless body, especially in front of the victim's own home, for close kin and neighbors to behold the gruesome spectacle, would

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[148] *See, e.g.*, Restatement (Second) of Torts: Interference with Dead Bodies § 868 (1982) (defining a cause of action for interference with dead bodies); Model Penal Code § 250.10 (Proposed Official Draft 1962) (making treatment of a corpse in a way that would "outrage ordinary family sensibilities" a misdemeanor); Criminal Code, R.S.C., ch. C-46, § 182 (1985) (Can.) (criminal law provision protecting the dignity of a corpse); *see also* Tyler Trent Ochoa, et al., *Defiling the Dead: Necrophilia and the Law*, 18 Whittier L. Rev. 539, 542-543 ("All societies for which there is any record have had customs concerning respect for corpses and the treatment of the bodies of the dead.").

rank as a degradation and mean affront to human dignity. By the same token, the relatives necessarily made to bear witness to the torture and degradation of their kin, or the ransacking of their common property, are technically not themselves victims of torture. Few would quarrel, however, that the offenders' lawlessness would cause these individuals themselves to suffer the severe emotional pain and indignities associated with forms of cruelty and inhuman treatment. Thus, wherever the nuances of conduct may blend at the frontiers that define the limits of cruel, inhuman or degrading treatment, this Court has no hesitation finding that the wrongs committed by ZANU-PF in this case fall well within the realm of the execrable—unlawful conduct that would be condemned and rejected as contravening well-established and universally recognized norms of international law.

b. Zimbabwe Law

Zimbabwe law also contains prohibitions against cruel, inhuman or degrading treatment. Specifically, the Zimbabwe Constitution provides that "no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."[149] It is not clear from the Zimbabwe law presented to the Court whether, behind this general proscription, Zimbabwe law recognizes a distinct, clearly defined private cause of action encompassing cruel, inhuman and degrading treatment. Some of the wrongs Plaintiffs charge under this claim, however, describe unlawful conduct that clearly would fall within the scope of assaults entailing homicide, injury to persons, destruction or damage to property. Such claims would be compensable under principles of Zimbabwe common law.[150]

Moreover, whether or not such injuries, inflicted by state agents or under the color of law, would state cognizable rights of action under Zimbabwe law, there can be no dispute that the actions describe violations other courts have found to fall

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[149] *See* Zimbabwe Const. Art. 15(1).

[150] *See* Laue Aff., ¶¶ 11-13.

within the proscriptions of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.[151] The dimension the offenses involved in these cases have in common include the wanton infliction of mental or physical suffering or assaults that manifest callous disregard for human dignity committed by the state or its agents through sustained, systematic and deliberate conduct engaged in the service of no legitimate public purpose.

4. Racial Discrimination and Unlawful Seizure of Property

With regard to Plaintiffs' Claims Six and Seven, the Magistrate Judge recommended an award of compensatory and punitive damages to Maria and David Stevens for the racial violence and terror they suffered through ZANU-PF unlawful conduct, and for damages caused by the Zimbabwe government's racially motivated confiscation of their farm, home and possessions motivated by racial animus. With respect to these claims, this Court found no basis to recognize that a taking of property by a sovereign state from its own citizens, as asserted here, constitutes a violation of well-established, universal norms of international law.[152] The Court left open the theoretical possibility of exercising pendent jurisdiction over the claim, but expressed reluctance to do so given the absence of a proof of relevant Zimbabwe municipal law to provide a grounds for such a remedy.

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[151] In the United States' ratification of the Civil and Political Rights Covenant the Senate expressed a reservation to Article 7, which relates to torture and cruel, inhuman or degrading treatment or punishment. It provides that "Art. 7 protections shall not extend beyond protections of the 5th, 8th and 14th Amendments of the U.S. Constitution." Senate Comm. on Foreign Relations Report on the International Covenant on Civil and Political Rights, S. Exec. Report. No. 23, 102nd Cong., 2d Sess. (1992), *reprinted in* 31 I.L.M. 645, 646 (1992). *See Mehnovic*, 198 F. Supp. 2d at 1347-48; *Cabello*, 157 F. Supp. 2d at 1360; *Jama*, 22 F. Supp. 2d at 363; *Xuncax*, 886 F. Supp. at 187.

[152] *See Tachiona III*, 216 F. Supp. 2d at 267.

a. Racial Discrimination

Systematic racial discrimination and racially-motivated violence, especially where practiced as a matter of state policy, is proscribed as violations of international standards in various international instruments.[153] Plaintiffs' claims of such misconduct are also closely analogous to contraventions of well-established principles embodied in the Fourteenth Amendment of the United States Constitution and related federal civil rights statutes making such violations actionable.[154]

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[153] *See, e.g.*, Universal Declaration, *supra*, Arts. 2, 7, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 2, 3. These provisions declare in pertinent part:

> Art. 2:
> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> Art. 7:
> All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Id.; *see also* Civil and Political Rights Covenant, *supra*, Arts. 2, 4(1), 26, *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 22, 23, 30; African Charter, *supra*, Arts. 2, 3, 4, 5, *reprinted in International Instruments*, *supra*, Vol. II at 331, 332; *International Convention on the Elimination of All Forms of Racial Discrimination*, *adopted* Dec. 21, 1965, Arts. 2, 3, 4, 5, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 68-71; *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277 (1951), *reprinted in International Instruments*, *supra*, Vol. I, Pt. 2, at 669; *International Convention on the Suppression and Punishment of the Crime of Apartheid*, Arts. II, III, IV, G.A. Res. 3068, 28 U.N. GAOR, Supp. 30, U.N. Doc. A/9030 (1973), *reprinted in International Instruments*, *supra*, Vol. I, Pt. 1, at 82-83; *Restatement of Foreign Relations*, *supra* § 702(e).

[154] *See* 42 U.S.C. § 1983; *Johnson v. Smith*, 890 F. Supp. 726, 728-29 (N.D. Ill. 1995).

Plaintiffs have submitted evidence to establish that the Zimbabwe Constitution and other laws guarantee fundamental individual rights regardless of race, origins, color, creed or sex, and prohibits all forms of discrimination on these grounds.[155]

b. Seizure of Property

The Zimbabwe Constitution forbids the state's seizure, damage or destruction of property without fair compensation.[156] Plaintiffs cite no authority, however, to support a determination that the state seizure of property of its own nationals without fair compensation described in Claim Seven constitutes a violation of well-defined, universal and obligatory norms of international conduct. It is true that the Universal Declaration, Art. 17, contains references the right to own property and not be arbitrarily deprived of it.[157] However, no corresponding right was included in the Civil and Political Rights Covenant, an omission that diminishes any claim to universal consensus concerning the status of this right as customary international law.

The Court has found no other persuasive evidence that universal consensus exists recognizing contravention of this principle as customary international law and defining the boundaries of the offenses with sufficient specificity. To the contrary, the case law that exists has rejected such a claim. In *Dreyfus v. Von Finck*,[158] the Second Circuit held that a state's

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[155] *See* Zimbabwe Const. Arts. 11, 23; Laue Aff., ¶¶ 14, 15.

[156] *See* Zimbabwe Const. Art. 16; Laue Aff., ¶ 12 (iii).

[157] *See International Instruments*, Vol. I, Pt. 1, at 4.

[158] 534 F.2d 24, 30 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976); *see also Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 214-15 (N.D. Ill. 1982) (holding that the expropriation by a state of property of its own nationals does not contravene the law of nations); *Restatement of Foreign Relations*, *supra* § 702 cmt. k (noting that "[t]here is . . . wide disagreement among states as to the scope and content of that right, which weighs against the conclusion that a human right to property generally has become a principle of customary law."); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-30 (1964) (noting the wide divergence of

seizure of the property of its nationals, even if racially motivated, was not a violation of the law of nations. Insofar as Plaintiffs assert that the invasions and unlawful takings of property for which ZANU-PF were racially-inspired, such misconduct is encompassed within the actions the Court sustained as recognized violations of international law under Claim Six.

Nonetheless, Plaintiffs' complaint invoked the Court's pendent jurisdiction under 28 U.S.C. § 1367 and asserted claims under Zimbabwe law.[159] The Court therefore will exercise its discretion to assert authority over those claims. Having examined the provisions of the Zimbabwe Constitution and related law called to its attention, the Court is satisfied that Plaintiffs have asserted rights and cognizable actions under Zimbabwe law that would entitle them to the compensatory damages recommended by the Magistrate Judge with respect to Claim Seven.

In connection with Claims Six and Seven, Plaintiffs made a general request for punitive damages, unlike the specific request they asserted with regard to their other five claims. However, because there is no evidence on the record to support a finding that Zimbabwe law would authorize the awarding of punitive damages in connection with unlawful seizure of property, the Court does not accept the portion of the Report that recommends Plaintiffs' recovery of exemplary damages with regard to Claim Seven.

III. CONCLUSION

The Court adopts the Magistrate Judge's recommendation, as modified above, that Plaintiffs be awarded compensatory and punitive damages as follows:

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authority as to international limitations on a state's taking of alien property).

[159] *See* Compl. ¶¶ 7, 210.

A. CLAIMS ONE AND TWO:

1. Extrajudicial Killing

	Compensatory	Punitive
Estate of Tapfuma Chiminya	$ 2,500,000	$ 5,000,000
Estate of Metthew Pfebve	$ 2,500,000	$ 5,000,000
Estate of David Stevens	$ 2,500,000	$ 5,000,000

2. Torture

Estate of Metthew Pfebve	$ 1,000,000	$ 5,000,000
Estate of David Stevens	$ 1,000,000	$ 5,000,000

B. CLAIMS THREE AND FOUR:

1. Loss of Enjoyment of Political Rights

Adella Chiminya	$ 500,000	$ 1,000,000
Efridah Pfebve	$ 500,000	$ 1,000,000
Elliott Pfebve	$ 1,000,000	$ 2,000,000
Evelyn Masaiti	$ 1,000,000	$ 2,000,000

2. Loss of Property

Efrideh Pfebve	$ 230,909

C. CLAIM FIVE

Cruel, Inhuman or Degrading Treatment

Estate of Tapfuma Chiminya	$ 1,000,000	$ 4,000,000
Estate of Metthew Pfebve	$ 1,000,000	$ 4,000,000
Estate of David Stevens	$ 1,000,000	$ 4,000,000
Efridah Pfebve	$ 1,000,000	$ 3,000,000
Evelyn Masaiti	$ 750,000	$ 1,500,000
Elliott Pfebve	$ 750,000	$ 1,500,000

D. CLAIMS SIX AND SEVEN

1. Systematic Racial Discrimination

Estate of David Stevens	$ 500,000	$ 1,000,000
Maria Stevens	$ 500,000	$ 1,000,000

2. Loss of Home, Destruction of Business and Seizure of Property

Maria Stevens	$ 1,000,000	
Evelyn Masaiti	$ 19,544	
TOTAL	$20,250,453	$51,000,000

IV. ORDER

For the foregoing reasons, subject to the modifications discussed above, the Court adopts the Report and Recommendation of Magistrate Judge James Francis, dated July 1, 2002. Accordingly, it is hereby

ORDERED that Judgment be entered in favor of Plaintiffs and against defendant ZANU-PF in a total amount of

$71,250,453.00 representing compensatory damages of $20,250,453.00 and punitive damages of $51,000,000.00 in accordance with the apportionment set forth above in the Conclusion section of this Decision and Order.

The Clerk of Court is directed to close this case.

SO ORDERED.

DATED: New York, New York
11 December 2002

/s/ Victor Marrero
Victor Marrero
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6666 (VM)

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, EFRIDAH PFEBVE, ON HER OWN BEHALF AND ON BEHALF OF HER LATE BROTHER METTHEW PFEBVE, ELLIOT PFEBVE, ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHER METTHEW PFEBVE, EVELYN MASAITI, ON HER OWN BEHALF, MARIA DEL CARMEN STEVENS, ON HER OWN BEHALF, ON BEHALF OF HER LATE HUSBAND DAVID YENDALL STEVENS, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

- against -

ROBERT GABRIEL MUGABE, IN HIS INDIVIDUAL AND PERSONAL CAPACITY, ZIMBABWE AFRICAN NATIONAL UNION-PATRIOTIC FRONT, STAN MUDENGE, JONATHAN MOYO, AND CERTAIN OTHER UNKNOWN NAMED SENIOR OFFICERS OF ZANU-PF,

Defendants.

DECISION AND ORDER

Filed Feb. 14, 2002

VICTOR MARRERO, United States District Judge.

In a Decision and Order dated October 30, 2001 (hereinafter the "Decision"), [1] this Court honored a "Suggestion of Immunity" filed by the United States on behalf of defendants Robert Gabriel Mugabe ("Mugabe") and Stan Mudenge ("Mudenge"), respectively President and Foreign Minister of Zimbabwe. On this basis, the Court dismissed claims against Mugabe and Mudenge set forth in Plaintiffs' class action describing a campaign of torture, terrorism, summary executions and related violations of international law allegedly committed by these officials and other defendants.

The Court ruled, however, that Plaintiffs' claims against defendant Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), of which Mugabe and Mudenge were senior officers and whose activities in this country they were promoting at the time they were served, could proceed to adjudication in this Court. In so deciding, the Court rejected the Government's contention that the action against ZANU-PF should be dismissed because the organization was not properly served with process. Such process had been effectuated through personal service on Mugabe and Mudenge. The Government argued that these officials enjoyed personal inviolability under the provisions of an applicable international treaty and, therefore, that any service of process on them should be quashed. Now before the Court is a motion by the United States requesting reconsideration of this aspect of the Decision.

In addition, the Government, not a party to the action, moves to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure for the limited purpose of preserving a right to appeal the Court's Decision.

I. MOTION FOR RECONSIDERATION

The standard of review applicable to motions for reconsideration in this District is set forth in Local Civil Rule 6.3. The

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[1] The Decision is reported as *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001). References to it below reflect the text and page numbers of the reported version.

Rule requires parties seeking reconsideration of a court's ruling to set forth concisely by motion "the matters or controlling decisions which counsel believes the court has overlooked." Local Civil Rule 6.3.[2] The only ground properly supporting the granting of a motion for reconsideration is that the Court overlooked matters or controlling decisions which, " 'had they been considered, might reasonably have altered the result reached by the court.' " *Schonberger v. Serchuk*, 742 F. Supp. 108, 119 (S.D.N.Y. 1990) (quoting *Adams v. United States*, 686 F. Supp. 417, 418 (S.D.N.Y. 1988)). Moreover, the Rule does not grant license for a party to "advance new facts, issues or arguments not previously presented to the Court." *Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Md.*, 768 F. Supp. 115, 116 (S.D.N.Y. 1991) (citations omitted).

The Government argues that the interpretation given by the State Department to the provisions of treaties to which the United States is a party is entitled to an extremely high degree of judicial deference, and that in this case the Court's Decision overlooked and is contrary to "clear and binding authority requiring courts to give 'great weight' to the Executive Branch's reading of treaty terms"—here the concept of "inviolability" as defined in the Vienna Convention on Diplomatic Relations (the "Vienna Convention").[3] The

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[2] Plaintiffs challenged the Government's motion on the ground that it was not timely filed. The Court has reviewed the respective arguments concerning this issue and, having determined that the Government's motion was timely, deems further discussion of this issue unnecessary.

[3] Memorandum of Law in Support of the United States' Motion for Reconsideration, dated Dec. 18, 2001 (hereinafter "Government Memorandum"), at 3-4. In support of its position, the Government cites *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation."); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("[T]he meaning given [treaty provisions] by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *767*

Government faults the Court's Decision on the ground that it "neither cites this authority nor exhibits any deference whatsoever to the Executive Branch's construction of the relevant provision."[4] (Government Memorandum, at 5.) The Court disagrees.

The Decision sets forth at length the respective views of Plaintiffs and the Government regarding the applicability of the principle of personal inviolability to the circumstances before the Court as they pertained to the service of process upon Mugabe and Mudenge related to Plaintiffs' claims against ZANU-PF. See *Tachiona*, 169 F. Supp. 2d at 302-03. Specifically, the Court noted that

> [t]he Government further maintains that the service of process is an assertion of jurisdiction and is thus precluded

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Third Ave. Assocs. v. Permanent Mission of Zaire, 988 F.2d 295, 301-02 (2d Cir. 1993). *See also* Vienna Convention, *done* April 18, 1961, *United States accession*, December 13, 1972, 23 U.S.T. 3227, 500 U.N.T.S. 95.

[4] In addition, the Government "expressly disavows" a reference in the Decision to ZANU-PF as an "intended beneficiary" of the Government's position. (Government Memorandum, at 10 n.3). The Court acknowledges the Government's concern, but finds the strenuous disavowal unnecessary. The Court did not intend by this reference to suggest in any way that the Government's position in this case was specifically motivated by a design to benefit ZANU-PF. Rather, the Court's meaning is more generic, expressing concern over what might occur in future instances under the Government's theory here, as well as what would occur as an indirect effect even if not specifically intended. Earlier in the Decision, the Court unequivocally recognized the precise scope of the Government's Suggestion of Immunity with regard to ZANU-PF: "Consequently, while the State Department's Suggestion of Immunity does not purport to assert immunity on behalf of ZANU-PF, and the Government has not maintained in this proceeding that ZANU-PF is entitled to invoke any form of immunity from the exercise of the Court's jurisdiction, the Government's inviolability theory effectively would achieve the same result by indirectly shielding ZANU-PF, under the cover of Mugabe's head-of-state immunity, from the reach of territorial jurisdiction." *Tachiona*, 169 F. Supp. 2d at 303.

> as to persons who enjoy immunity from the Court's jurisdiction because if personal jurisdiction is lacking, then service of process is void. Moreover, the Government asserts that "the State Department considers that personal inviolability under Article 29 of the Vienna Convention precludes the service of compulsory legal process on diplomatic agents."

Id. (citations omitted).

After examining the Government's contention, the historical roots of the principle of inviolability and the limited case law addressing the scope of the doctrine, the Court found insufficient support for the position the Government articulated. On this basis point, the Court concluded that it must "part [ ] company with the Government's view." *Id.* at 304.

This discussion could not have been framed more explicitly to manifest that, rather than overlooking or failing to give the Government's construction the "great weight" it merited, the Court went to great lengths to acknowledge its recognition of the Government's position and to accord it appropriate consideration and respect. That the Court did not at that particular point in its Decision incant specific talismanic words or signal references to the cases the Government cites does not in any way diminish from the substantive grade or quality of consideration the Court actually extended to the Government's contention in this regard. Insofar as it may not be absolutely clear from the Decision that the Court took full account of the Government's argument and accorded its reading of the Vienna Convention the prescribed great weight, the Court here reaffirms that in deciding as it did it was mindful of the pertinent rule of construction, and that had it not applied the relevant standard in the Decision, upon any reconsideration it would reach the same conclusion.

In fact, in its analysis of the inviolability issue, the Court expressed full cognizance of both the proper rule of treaty interpretation and of the specific authorities the Government cites. Immediately preceding its discussion of inviolability, in

the section of the Decision concerning the application of Section 11 of the Vienna Convention, the Court expressed its recognition of the relevant standard and case law and actually invoked them, assigning the Government's construction of Section 11 the "great weight" to which it was entitled. *See Tachiona*, 169 F. Supp. 2d at 302 n. 186 (citing *Sumitomo*, 457 U.S. at 184-85; *Kolovrat*, 36 U.S. at 194; and *767 Third Ave. Assocs.*, 988 F.2d at 301-02). By the same token, relying on common law doctrine and declining to exercise personal and subject matter jurisdiction over Mugabe and Mudenge, the Court similarly accorded binding recognition to the Government's reading of the concept of sovereign immunity as it applies to heads of state. Having already articulated the applicable decisional framework and case law guidance with respect to these issues, the Court did not deem it necessary to repeat them, relying instead on an extensive exposition of the Government's theory and arguments to convey the depth of consideration given to those views.

In this regard, the Court notes that in connection with the issues pertaining to head-of-state and diplomatic immunity, the Government filed a "Suggestion of Immunity" on behalf of Mugabe and Mudenge, the intercession that the Court honored. On the other hand, concerning Plaintiffs' action against ZANU-PF, the Government's submission to the Court offered "advice" that the organization was not subject to Plaintiffs' suit because it was not properly served with process. That advice was grounded on the Government's interpretation that the term "inviolable" as used in Article 29 of the Vienna Convention shielded Mugabe and Mudenge from all service of process, even if intended to assert claims against ZANU-PF. The Court rejected the Government's reading of the scope of "inviolability" as not entitled to the same degree of deference for several reasons expressly or impliedly detailed in the Decision.

First, to the extent the Government's theory rests upon a construction and application of the Vienna Convention, its reliance is misplaced. The genesis and negotiating history of the Vienna Convention make clear that the purpose the treaty

intended to address was the codification of rules governing diplomatic relations between sovereign states and the organization and functioning of permanent diplomatic missions in states with established relations. *See Report of the International Law Commission: Diplomatic Intercourse and Immunities*, U.N.G.A. 12th Sess., Supp. 9, U.N. Doc. A/3623 (1957), *reprinted in* II Y.B. Int'l L. Comm'n 131, 133, U.N. Doc. A/CN.41 Ser. A/1957/Add. 1 (hereinafter "1957 Int'l L. Comm'n Report"). Furthermore, the legislative history of the Diplomatic Relations Act, 22 U.S.C. §§ 254a-254e, which was enacted as a "necessary complement"[5] to the Vienna Convention, and the views of leading commentators affirm the Court's view that, while the Vienna Convention rendered the contours of diplomatic privilege and immunities more precise, it did not explicitly make those same inroads with respect to head-of-state immunity.

By its express terms, the Vienna Convention, whose text derives from the 1957 Int'l L. Comm'n Report as subsequently refined, deals with the definition of the personal privileges and immunities conferred on accredited diplomats in order to "ensure the efficient performance of the functions of diplomatic missions as representing states." Vienna Convention, Preamble. Specifically, the treaty applies to diplomatic agents defined as "the head of the mission or a member of the diplomatic staff of the mission." Vienna Convention, Art. 1; *see also* Diplomatic Relations Act, 22 U.S.C. § 254a(1). While the Vienna Convention goes into precise detail as to the categories of diplomatic personnel eligible to receive varying degrees of immunity, nowhere in the text is there any mention of heads of state or foreign ministers, nor of the scope of privileges and immunities or defenses from territorial jurisdiction applicable to them. *See* Vienna Convention, Art. 37; Lord Gore-Booth, *Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1975) (hereinafter "*Satow's Guide*"). As to subjects not addressed, the treaty reaffirms that "the rules of customary international

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[5] 124 Cong. Rec. 26,717 (Aug. 17, 1978) (statement of Sen. Sarbanes).

law should continue to govern questions not expressly regulated by the provisions of the present Convention." Vienna Convention, Preamble.

The legislative history of the Diplomatic Relations Act similarly provides little support for the State Department's position that its interpretation of the Vienna Convention controls the scope of immunity conferred upon heads of state and foreign ministers. While the voluminous reports, hearings and floor debates evince a rigid preoccupation with the problem of parking tickets and traffic accidents involving the foreign diplomatic corps stationed in the United States, the legislative history reveals no discussion of immunity with respect to heads of state or foreign ministers. *See, e.g., Diplomatic Immunity: Hearing on S. 476, S. 477, S. 478, S. 1256, S. 1257, and H.R. 7819 Before Sen. Comm. on the Judiciary*, 95th Cong. 26-27 (1978) (statement of Rep. Joseph L. Fisher) ("My interest in diplomatic immunity was aroused by a tragic incident . . . . A young constituent was killed by an automobile driven by a chauffeur from a foreign embassy. The car carried no liability insurance, and the chauffeur had full immunity from our criminal and civil processes.").

When the legislators and participants specifically addressed the scope of the Vienna Convention, they carefully detailed the categories of diplomats covered, but noticeably refrained from any discussion of heads of state or foreign ministers. Thus, in critical questioning by the Senate Judiciary Committee of the Justice Department's Chief of Foreign Litigation, no reference to heads of state or foreign ministers appears:

> Senator METZENBAUM. Mr. Ristau, I would appreciate your advising us who under the convention would continue to retain complete immunity, who would have limited immunity, and who would have none at all.
>
> Mr. RISTAU. Mr. Chairman, the convention sets up three categories of diplomatic agents. In the first category are the ambassadors and the high-ranking members of a diplomatic mission. They are referred to in the convention

> as diplomatic agents. . . . The second category comprises: "members of the administrative and technical staff." . . . The third category are "members of the service staff."

Id. at 31-32. Thus, to the extent that the State Department attempts to rely on the Vienna Convention as a source of authority for its position on head-of-state immunity, that view of the Convention appears not to have been in the minds of legislators and policy makers when enacting the complementary legislation to the United States' accession. The silence of the legislature with respect to the immunity of heads of state and foreign ministers in its discussions of the Vienna Convention strongly suggests that the scope of that treaty is accordingly limited to the categories of diplomats meticulously spelled out in the text of the treaty and the Diplomatic Relations Act. *See, e.g., Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) ("Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.").

This view on the scope of the Vienna Convention borne out in the legislative history is also reaffirmed by leading commentators on international law. Sir Arthur Watts, while acknowledging that some principles of the Vienna Convention may be relevant in defining the boundaries of head-of-state immunity, concludes that, "[i]n most respects the law relating to the position of Heads of States in international law is a matter of customary international law, evolving as and when occasion arises for State practice to be apparent. In particular, the law owes much of its development to decisions of municipal courts over the past century and a half." Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 Collected Courses of the Hague Academy of International Law 9, 37-40 (1994) (hereinafter "Watts").

While diplomatic privileges and immunities receive the benefit of relatively precise delineation in the Vienna Convention, the view in this Circuit and others is that

head-of-state immunity remains in flux. *See Tachiona*, 169 F. Supp. 2d at 277 ("[T]he Second Circuit and other courts concur only in that '[t]he scope of this [head-of-state] immunity is in an amorphous and undeveloped state.") (citing *In re Doe v. United States*, 860 F.2d 40, 44 (2d Cir. 1988) and *In re Grand Jury Proceedings, John Doe # 700*, 817 F.2d 1108, 1110 (4th Cir. 1987)). Leading commentators on international law concur. *See, e.g.*, I Oppenheim's International Law, § 490, at 1070 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) ("The law relating to permanent diplomatic missions attained a considerable degree of certainty as customary international law and much of it is now contained in the Vienna Convention on Diplomatic Relations 1961 . . . ."); *BCCI: Criminal and Civil Acts: Hearing Before House Comm. on Banking, Finance, and Urban Affairs*, 103d Cong. (1993) (statement of Professor Joseph Dellapenna) ("What we are left with, then, is an amorphous doctrine whose very existence is not entirely settled and whose reach is almost completely uncertain. While the State Department continues to attempt to control the application of the notion of head of state immunity . . . [w]hether courts should be bound by such 'suggestions' or should even pay much attention to them is far from clear, although courts certainly seemed inclined to do so.").[6]

In the few reported cases where the principles of diplomatic immunity and head-of-state immunity intersect, practitioners in other countries have also taken the view that the Vienna

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[6] *See also* B.S. Murty, The international Law of Diplomacy: The Diplomatic Instrument and World Public Order 335 (1989) ("Since time immemorial, persons sent as diplomatic emissaries by an elite to another elite have been given some immunities and privileges, and these have been elaborated and given relative precision over time."); Jerrold L. Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev. 169, 171 (1986) ("Moreover, head of state immunity must also be considered distinct from diplomatic immunity, although some overlap exists. Thus, determining the degree of immunity that attaches to foreign heads of state is problematic because current law regarding this immunity is ambiguous.") (hereinafter "Mallory").

Convention did not expressly codify the law relating to heads of state. For instance, an attorney for the prosecution in the recent extradition case involving Senator Augusto Pinochet Ugarte argued in a statement incorporated in the decision of the House of Lords that: "No international agreement specifically provides for the immunities of a head of state or former head of state. However, under customary international law a state is entitled to expect that the head of state will enjoy a measure of immunity from the jurisdiction of the courts of other states. That immunity reflects the respect due to the dignity of the head of state but the extent of the immunity is uncertain." *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Ex parte Pinochet Ugarte)*, [2000] 1 A.C. 147, 155 (statement of Professor Christopher Greenwood).[7]

The import of the Court's discussion of the negotiating history of the Vienna Convention, the legislative history of the Diplomatic Relations Act and the views of leading international scholars and practitioners is simple: the weight of authority fails to support the notion that the Vienna Convention determines the applicability of head-of-state immunity in this controversy, and therefore, the State Department's position that this Court failed to give due consideration to its "treaty" determination is untenable.

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[7] The uncertain boundaries of head-of-state immunity are also reflected in variances within the range of state practice. Although states are broadly in agreement that heads of state should be accorded some immunity, they diverge with respect to the extent of such immunity. *See Tachiona*, 169 F. Supp. 2d at 276 n.63; *see also* Mallory, 86 Colum. L. Rev. at 177-78. Mallory notes the following disparities in state practice: The United Kingdom grants a "modified form of restrictive immunity" to heads of state, based on the concepts of sovereign and diplomatic immunity; France seems to recognize a greater degree of head-of-state immunity comparable to diplomatic immunity; and the former Soviet Union consistently adhered to a theory of absolute sovereign immunity. It would seem implausible, given the range of state practice, that the Vienna Convention somehow codified head-of-state immunity with the degree of precision that the Government's position here suggests.

Leaving the Vienna Convention aside for the moment, the precise contours of the protection from assertions of foreign territorial jurisdiction over heads of state are not specifically spelled out in any other treaty or universally accepted instrument reflecting customary international law. As one leading treatise has noted: "The New York Convention on Special Missions of 1969 provides that heads-of-state leading a special mission shall enjoy 'the facilities, privileges and immunities accorded by international law to Heads of State on an official visit,' but it does not define in any detail these facilities, privileges and immunities." *Satow's Guide*, at 9. Accordingly, the Court, even if ascribing appropriate weight to the Government's view, did not feel obliged in its Decision to subscribe to a theory that does not derive from or follow clear treaty language, or to defer to the State Department's construction of a Convention that on its face does not apply to the particular circumstances before the Court.

Second, the Court noted that even if the Vienna Convention's principle of inviolability applied to Mugabe and Mudenge, the concept is not absolute. The textual guidance the treaty provides to the meaning of personal inviolability mentions only the diplomatic agent's freedom from any form of arrest or detention and the receiving State's duty to treat him with respect and to take appropriate steps "to prevent any attack on his person, freedom or dignity." Vienna Convention, Art. 29. The International Law Commission's commentary on the draft article that served as the precursor to the Vienna Convention's provision on personal inviolability elaborates that "[b]eing inviolable, the diplomatic agent is exempted from certain measures that would amount to *direct coercion*." 1957 Int'l L. Comm'n Report, at 138 (emphasis added).

In practice, as the Court observed, the cases which have addressed this provision have all dealt with various forms of coercive actions implicating the diplomats directly—and thus potentially interfering substantially with their persons or impeding their ability to perform their governmental or diplomatic functions—rather than actions aimed at private third parties with which the diplomats may be closely

affiliated. *See Tachiona*, 169 F. Supp. 2d at 304 n.196 and accompanying text.

Moreover, the Court also pointed out that the Vienna Convention itself admits of exceptions to inviolability. Article 31 excludes from immunity from the civil and administrative jurisdiction diplomatic agents enjoy three types of cases, including "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." Vienna Convention, Art. 31(c).

Each of the three specific exceptions permits an exercise of jurisdiction directly against the diplomatic agent who is himself named a party to an action involving some private transaction conducted in the receiving state. To this extent, these recognized assertions of jurisdiction could create significant interferences with the diplomat's official functions and dignity. Nonetheless, the Vienna Convention permits the exercise of national jurisdiction to enable adjudication of acts not within the scope of the diplomat's governmental duties that relate to the complainant's claims. In the balancing of national and international interests, official and unofficial diplomatic acts and the rights of private versus governmental persons, the Convention recognizes exceptions where the equities tip in the direction of private parties asserting wrongs from unofficial acts and the interference with diplomatic responsibilities are thus minimized.

Here, Plaintiffs claimed that at the time Mugabe and Mudenge were served, the officials were attending a ZANU-PF event whose purpose was to raise private funds for and promote the organization's activities. Plaintiffs contended that this event did not encompass governmental functions. Insofar as its design was to garner financing and other support intended for a private entity, supplying ZANU-PF with the financial and political means with which to carry out the wrongful actions Plaintiffs alleged, the event arguably could be read to encompass a professional or commercial activity exercised in this country outside Mugabe's and Mudenge's official functions. Because

authority interpreting or applying these provisions is sparse, the Court cannot conclude that the Government's reading of the Vienna Convention follows from clear treaty language, or from practice concerning which an accepted international consensus exists.

Third, if not founded on the Vienna Convention itself, the inviolability the Government seeks to confer upon Mugabe and Mudenge would derive, if at all, from the general scope of head-of-state immunity as it has developed under principles of customary international law and corresponding domestic jurisprudence. *See, e.g.*, Restatement (Third) of Foreign Relations Law, § 464, Reporter's Note 14 (1986). As stated above, however, no definitive statement exists in any international agreement or other authority defining the range of privileges and immunities—and thus the full meaning of inviolability—that apply to heads of state. While it may be argued that under some or most circumstances the reach of inviolability of heads of state should be coextensive with the parallel protections accorded to diplomatic agents under the Vienna Convention, that is not to say that reliable authority exists for the proposition that the international community has deliberated and passed upon the matter and reached an accepted consensus to this effect. In fact, it is conceivable that were the privileges and immunities extended to heads of state under customary international law to be codified in a treaty, circumstances may be defined to justify some distinctions in treatment of inviolability as between heads of state and diplomatic agents, just as, for example, differences exist in the scope of privileges and immunities enjoyed by accredited envoys under the Vienna Convention and those accorded to consular officers under the Vienna Convention on Consular Relations. *See generally* Watts, 247 Collected Courses of the Hague Academy of International Law at 40 ("Yet analogy is not always a reliable basis on which to build rules of law, and certain fundamental differences exist between an ambassador's circumstances and those of a Head of State."); Lori J. Shapiro, *Foreign Relations Law: Modern Developments in Diplomatic Immunity*, 1989 Ann. Surv. Am. L. 281, 296.

More to the point in the matter at hand, there is no evidence in the sparse authority that exists that, were the very narrow issue to be thoroughly examined, the international community, such as it is today, would converge around a consensus defining inviolability as effectively extending sovereign immunity to the acts of private parties acting in concert with government officials to commit gross violations of international human rights. In fact, if any trend emerges from recent developments in international law, it is precisely in the direction of heightened sensitivity to international human rights, less tolerance for the old barriers that shielded the sovereign's private wrongful conduct and greater relaxation of jurisdictional rules so as to facilitate vindication of individual rights against extreme misconduct violating international norms. *See Tachiona*, 169 F. Supp. 2d at 278-80.

In any event, absent specific authority under customary international law for the theory and contours of inviolability the Government propounded as to heads of state, the Court regarded the Government's position as an expanded derivative of the common law doctrine of head-of-state immunity. Because the Court found that the precise scope of head-of-state immunity was still formative, subject to numerous open questions and unsettled doubts, it declined the invitation to enlarge the bounds of the principle to the limits the Government advised. *See Tachiona*, 169 F. Supp. 2d at 304-05. On this point, the Court noted that "[n]othing in the evolution of the common law doctrine suggests that the exception also encompassed conferring upon the State Department the function of defining the full reach of the concept of inviolability as it pertains to heads-of-state." *Id.* In view of the flux, uncertainties and absence of settled law surrounding head-of-state immunity, the Court then concluded that these were matters for "reasoned judicial interpretation in the light of experience and by sound application of the emerging common law, rather than by reflexive expansion of the executive branch's categorical reading of a limited doctrinal exception." *Id.*

The Government also urges reconsideration on policy grounds. It argues that the Court's "failure to give deference to the Executive Branch's treaty interpretation is likely to interfere with the conduct of foreign affairs." Specifically, the Government contends that service of process on certain visiting foreign officials would significantly divert from the performance of their foreign relations functions. (Government's Memorandum, at 9.) Moreover, the Government asserts that foreign states will "protest efforts to subject their high officials to United States civil litigation when those officials visit our nation to attend to international affairs." (Reply Memorandum of Law in Support of the United States' Motion for Reconsideration, dated Dec. 18, 2001, at 8.)

The Decision considered these arguments. In response, the Court acknowledged that certain forms of actions and assertions of jurisdiction taken directly against foreign government leaders or diplomats not only clearly hinder the performance of their official duties but constitute affronts to the person and dignity of the officials. It was the Court's view, however, that these concerns do not arise to the same extent, if at all, when the service of process, as was the case in the matter at hand, is intended to confer jurisdiction concerning actions and parties collateral to the foreign officials' governmental functions and do not demand the officials' appearance in court or otherwise subject them to the court's compulsory powers. *See Tachiona*, 169 F. Supp. 2d at 305-06. Thus, the Government's reference to "efforts to subject high officials to United States litigation" is unfounded.

In the instant case, for example, the Court stressed that it is ZANU-PF institutionally, and not Mugabe and Mudenge personally, to which the Court's jurisdiction applies and which is called to answer the process served on Mugabe and Mudenge—who at that time were senior officers and agents of ZANU-PF, and were engaged in furthering the private organization's activities. *See id.* In the Court's analysis, in balancing the equities and weighing the policy considerations the Government cites, any potential interference with the foreign officials' governmental functions under these

circumstances would be minimal compared to the more substantial advancement of the interests of justice achieved by enabling significant claims against the private entity to be adjudicated. *See id.*

The Court finds in the Government's position a troubling aspect that merits additional comment. The Court having given due consideration to the Government's views and "advice" regarding both head-of-state and diplomatic immunity and the concept of inviolability, as well as to its reading of an international treaty whose applicability here is at least arguable, the Government nonetheless appears to take issue and perhaps umbrage with the Court's disagreement with its "advice." Implicit in the Government's posture is that its concept of "great weight" necessarily must yield concurrence, in other words, that upon being handed the Government's proffered reading of an international agreement, the Court is obliged, at the risk of otherwise causing indignity and affront, to give binding effect to what the Government says the treaty means. If indeed this view reflects the Government's concept of "clear and binding rules of judicial construction of treaty terms," the Government equates deference to submission, and would conflate "great weight" with surrendered judicial independence. (Government's Memorandum, at 5.) Were this notion to prevail, the Court's constitutional role and discretion in treaty interpretation effectively would be reduced to that of a mere echo of the Government's perspective. It implies that in practice once the Government has proclaimed its reading of particular treaty provisions, the Court's sole judicial duty would be obeisance—to toe the official line and apply the prescribed construction. And should it miss the Government's cue and fail to get it right in the first instance, the Court would be bound to correct its error upon the Government's prompting reconsideration. This Court cannot accept such a proposition. Even in articulation the theory makes a mockery of constitutional separation of powers. Manifestly, its effectuation would spell doom for judicial independence.

II. MOTION TO INTERVENE

By letter brief dated December 18, 2001, the Government moved to intervene in this matter pursuant to Rules 24(a) and (b) of the Federal Rules of Civil Procedure on the grounds of intervention as of right and permissive intervention, respectively. (*See* Government's Letter, dated Dec. 18, 2001 (hereinafter "Intervention Motion").) The Government expressly limited the purpose of its intervention to appealing certain aspects of the Decision after the pending inquest on damages and the entry of final judgment. The Court subsequently directed Plaintiffs to respond, which they did by letter on January 10, 2002. (*See* Plaintiffs' Letter, dated Jan. 10, 2002 (hereinafter "Intervention Opposition").) Taken together, the Court accepts these submissions as the formal motion to intervene and the Plaintiffs' opposition to the Government's motion.[8]

Pursuant to Rule 24(a)(2), the Government contends that it has a right to intervene for the purpose of appeal in the pending litigation. Rule 24(a)(2) requires the movant to conclusively establish four criteria: "the applicant must (1) file a timely motion; (2) claim an interest relating to the property or transaction that is the subject of the action; (3) be so situated that without intervention the disposition of the action may impair that interest; and (4) show that the interest is not already adequately represented by existing parties." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176

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[8] In general, Rule 24(c) requires the submission of a formal motion and supplemental pleadings in order to trigger the motion. Where, however, the position of the movant is apparent from other filings and where the opposing party will not be prejudiced, Rule 24(c) permits a degree of flexibility with technical requirements. *Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 782 F. Supp. 870, 874 (S.D.N.Y. 1991). Here, there is no question that the Government's position has been meticulously set forth in its Suggestion of Immunity and related briefs filed in conjunction with motion practice. Consequently, the Government's presence in the pending litigation, and its position therein, come as no surprise to anyone. Therefore, the Court accepts the current submissions as constituting the motion to intervene and the Plaintiffs' opposition.

(2d Cir. 2001) (citations omitted). Failure to meet any one of the above requirements justifies denial of the motion. *Id.*

Nevertheless, the test is a flexible and discretionary one, and courts generally look at all four factors as a whole rather than focusing narrowly on any one of the criteria. *See United States v. Hooker Chemicals & Plastics*, 749 F.2d 968, 983 (2d Cir. 1984) ("The various components of the Rule are not bright lines, but ranges—not all 'interests' are of equal rank, not all impairments are of the same degree, representation by existing parties may be more or less adequate, and there is no litmus paper test for timeliness. Application of the Rule requires that its components be read not discretely, but together."). In light of the unique issues raised by the present controversy and upon balancing all of the *Butler* factors, the Court finds that there are sufficient grounds to grant the application of the Government to intervene.

As to the threshold requirement of timeliness, Plaintiffs contend that the Government's motion is untimely because the Government has known of its alleged interest in the litigation at least as early as September 2000, when it first entered an appearance in this matter, and because intervention at this stage would unduly delay the proceedings and prejudice them. Although Plaintiffs are correct in their chronology, the Government's limited purpose application belies the untimeliness of its motion. If the Government sought to intervene in order to present evidence or take testimony, Plaintiffs would be correct that such a motion would likely be untimely. The Government moves, however, for the limited purpose of appealing certain aspects of the Decision.

In *United Airlines, Inc. v. Liane Buix McDonald*, 432 U.S. 385, 394 (1977), the Supreme Court held that the "critical fact" in assessing the timeliness of a motion to intervene for purposes of appeal turns on when, after the entry of final judgment, the applicant seeks to enter the litigation. In the present matter, the Court issued its Decision on October 30, 2001. Thereafter, the Government filed a motion for reconsideration on November 16, 2001, which was still pending when it submitted the present motion to intervene.

Furthermore, although the Decision ruled on the merits of Plaintiffs' underlying default motion, final judgment cannot be entered until the inquest on damages is completed.

Under the circumstances, the Government's motion cannot be deemed untimely. Because it was filed before decision on the motion for reconsideration and before entry of final judgment, the Court finds that the motion to intervene for the limited purpose of appeal was properly filed within the time frame contemplated by Rule 24. Furthermore, the argument of undue delay and prejudice is unconvincing. Neither the Government's current application nor its prior involvement in the case has delayed the Court's consideration of the merits, and an appeal by any party can hardly surprise opposing counsel.

The interest requirement, however, is more complex and nuanced. The plain language of Rule 24(a)(2) requires the Government to establish an interest "relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2). Plaintiffs claim that the Government has "no defensible interest relating to the property or transaction that is the subject of plaintiffs' private claims against ZANU-PF, a private entity." (Intervention Opposition, at 2). It is true that the underlying action concerns a claim for monetary damages against a private entity in Zimbabwe for alleged human rights abuses. Therefore, the Government's primary asserted interest—"fundamental issues of international comity and the conduct of foreign affairs"—appears to be unrelated to any subject in dispute between the parties. (Intervention Motion, at 2.) The Government's interest in the matter, as framed above, does not implicate any cognizable property right, and the critical transactions or events at issue in the underlying action concern allegations of gross violations of international human rights law committed in Zimbabwe.

The Court's discussion should not be mistaken for the proposition that the Government's interests are unimportant. As stated, the Government's interests touch upon matters of international comity and United States foreign relations which are of vital importance from a constitutional and public policy

perspective. The issue, however, is whether the Government's statement of interests amounts to "interest" as narrowly tailored in Rule 24(a)(2).

The failure to meet the textual requirements of "interest," however, will not automatically dispose of a motion to intervene. Some courts and commentators have advanced the notion that where a case implicates substantial and important issues of public law, the interest requirement may be applied less rigidly. *See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) (State of California permitted to intervene in antitrust action where State had a strong interest in framing divestiture decree); 6 Moore's Federal Practice § 24.03[2][c] (3d ed. 1997).[9] Because of the unique facts underlying the present matter and the substantial public policy issues implicated therein, the Court finds that the Government's interests may be characterized as sufficiently strong to sustain a motion to intervene.

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[9] The Court recognizes that the *Cascade* decision has been the subject of robust criticism, and several subsequent decisions have narrowly tailored the decision to its unique facts. *See Hooker Chemicals*, 749 F.2d at 986 n.15 (citation omitted) ("*Cascade* has come to be regarded as an extraordinary case, occasioned by the Court's 'splenetic displeasure' with the government's lack of diligence in seeking relief."); *United States v. International Business Machines Corp.*, No. 72 Civ. 344, 1995 WL 366383, *2 (S.D.N.Y. June 19, 1995) ("*Cascade* involved an extraordinary situation—not present in the instant action—which persuaded the Supreme Court to take the unusual step of permitting third parties to intervene in a government antitrust action . . . . Subsequent antitrust decisions, however, establish that *Cascade* has been accorded little precedential weight."). This Court recognizes the disagreement over the precedential value of *Cascade* and the unique facts on which the Supreme Court based its decision. Nevertheless, the fact that applicants under Rule 24(a)(2) may, under compelling circumstances, plausibly state a substantial interest touching on an issue of public concern survives the criticisms of *Cascade*. Furthermore, the Government's role in this case, as discussed above, is materially different from private antitrust plaintiffs seeking to preserve some competitive advantage that might inure to their benefit.

First, it would be entirely untenable to assert that the Government's interests in this matter are minimal. Rather, the importance of the Government's interests here are confirmed by the procedural mechanism, endorsed by statute and case law and implemented in this case, of accepting a Suggestion of Immunity from the Government.[10] This Court's acceptance of this procedural mechanism was an outright recognition that the Government was not only interested in this matter from a philosophical standpoint, but also that its interests were inextricably linked to the controversy in such a way that the Court should entertain a formal submission from the Government and, with respect to some claims, accord great weight to its views. Thus, by virtue of this procedural device, the interest analysis must begin with the recognition of the Government's rightful place in this dispute.

Second, it is relevant that the Government has both specific and general interests that overlap. The sequence of events leading up to the Decision began with the service of process upon Mugabe and Mudenge. Because all defendants failed to answer or respond in any way, Plaintiffs moved for a default judgment, which the Court granted as to ZANU-PF. The Government takes issue with that aspect of the Decision, claiming that the service of process on Mugabe and Mudenge was defective for the reasons discussed in Part I, *supra*. In light of these events, the Government's interests are implicitly two-fold: the Government may be said to have a specific interest in quashing the service of process on Mugabe and Mudenge because of its purported interference with United States foreign relations vis-a-vis Zimbabwe; and the

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[10] Diplomatic Relations Act, 22 U.S.C. § 254d. § 254d states: "Such immunity may be established upon motion or suggestion by or *on behalf of* the individual, or as otherwise permitted by law or applicable rules of procedure." *Id.* (emphasis supplied). By practice and tradition, only the Government enters suggestions of immunity on behalf of eligible individuals. *See Jungquist v. Nahyan*, 940 F. Supp. 312, 321-22 (D.D.C. 1996) ("In sum, the determination of a diplomat's status as such is made by the State Department, not the Court.") (citations omitted), *rev'd on other grounds*, 115 F.3d 1020 (D.C. Cir. 1997).

Government may have a broader interest, the one more clearly advanced by counsel, in fashioning a rule of law that does not jeopardize international comity or foreign relations with other visiting heads of state. Viewed this way, both the specific and general interests provide a sound basis for intervention for the limited purpose of appeal.

Finally, the Court notes that the Government's interests are not merely sanctioned by statute, case law and public policy considerations. The Government's right to be heard here has an additional constitutional underpinning. The United States Constitution does not expressly or exclusively grant authority to conduct foreign relations to any one branch of the Government, but it is beyond dispute that under Article II, section 2 and other statutory and common law provisions, the Executive Branch, acting through its subsidiary agencies, has substantial responsibilities with regard to this country's foreign relations. Taking into account all of these factors, the Court finds that the unique circumstances presented here and the Government's express and implied interests support a basis for intervention.

As to the remaining criteria, the Court finds no substantial dispute. The conduct of the named defendants, or lack thereof, leaves no doubt as to the inadequacy of the representation of their interests. Because defendants have deliberately chosen to ignore the Plaintiffs' grievances in this action, the service of process upon them and the motion for judgment against them, the only opposition to Plaintiffs' claims has come from the Government. Furthermore, in light of the Court's discussion of substantial interests above, the Court also finds that the Government is in fact situated in such a way that the ultimate disposition of this case could affect those Government interests. A decision affecting, as perceived by the Government, the treatment of heads of state or foreign ministers visiting the United States, particularly under the circumstances present here, may have some potential to implicate United States foreign relations in a manner that the Government could legitimately seek to mitigate by appeal of this Court's Decision.

Having established the four criteria set forth in *Butler*, the Court grants the Government's motion to intervene pursuant to Rule 24(a)(2) for the limited purpose of appeal.

CONCLUSION AND ORDER

For the reasons discussed above, it is hereby

ORDERED that the Government's motion for reconsideration of the Court's Decision and Order dated October 30, 2001 is DENIED; and it is further

ORDERED that the Government's motion to intervene for the limited purpose of appealing the Decision is GRANTED.

SO ORDERED.

Dated: New York, New York
14 February 2002

/s/ Victor Marrero
Victor Marrero
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6666 (VM)

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, EFRIDAH PFEBVE, ON HER OWN BEHALF AND ON BEHALF OF HER LATE BROTHER METTHEW PFEBVE, ELLIOT PFEBVE, ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHER METTHEW PFEBVE, EVELYN MASAITI, ON HER OWN BEHALF, MARIA DEL CARMEN STEVENS, ON HER OWN BEHALF, ON BEHALF OF HER LATE HUSBAND DAVID YENDALL STEVENS, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

- against -

ROBERT GABRIEL MUGABE, IN HIS INDIVIDUAL AND PERSONAL CAPACITY, ZIMBABWE AFRICAN NATIONAL UNION-PATRIOTIC FRONT, STAN MUDENGE, JONATHAN MOYO, AND CERTAIN OTHER UNKNOWN NAMED SENIOR OFFICERS OF ZANU-PF,

Defendants.

DECISION AND ORDER

Filed Oct. 30, 2001

VICTOR MARRERO, United States District Judge.

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Plaintiffs (hereinafter referred to collectively as "Plaintiffs") are citizens of Zimbabwe. They brought this suit as a class action in their own names and on behalf of other similarly situated Zimbabweans who Plaintiffs claim have suffered from wrongful actions they attribute to defendants. Plaintiffs' claims are lodged against Robert Gabriel Mugabe (hereinafter "Mugabe"), who is the President of Zimbabwe; Stan Mudenge (hereinafter "Mudenge"), Zimbabwe's Foreign Minister; and Jonathan Moyo, Minister for Information and Publicity of Zimbabwe; as well as against the Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), the Zimbabwe government's ruling political party of which Mugabe is First Secretary and President, and Mudenge and Moyo are senior officers. As jurisdictional and substantive grounds for their action Plaintiffs invoke the Alien Tort Claims Act ("ATCA"),[1] the Torture Victim Protection Act ("TVPA"),[2] the general federal question jurisdictional statute,[3] and fundamental norms of international human rights law.[4]

BACKGROUND

The principles at issue in this case hold ancient roots. They trace to a time when the concept of the sovereign embodied a dual meaning. It stood for both the abstract nation and the corporeal person of its ruler: the State was the monarch and the monarch was the State. The echoes of that notion resound most prominently in words that issue from the *ancien régime*, when perhaps not at all in haughty jest, but in a pointed reflection of then perceived reality, France's King Louis XIV, in his enduring remark "L'état, c'est moi", proclaimed the state and himself synonymous.

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[1] 28 U.S.C. § 1350.

[2] Pub. L. 102-256, 106 Stat. 73 (Mar. 12, 1992) (codified at 28 U.S.C. § 1350 Note).

[3] 28 U.S.C. § 1331.

[4] *See* Compl. ¶¶ 10, 173, 179-83, 188, 193, 199, 204, 211; *see also infra* notes 206-42 and accompanying text.

Old ideas die hard. And so, the core of the controversy now before the Court tests the residual vigor of a political and legal legacy of sovereign antiquity. At issue is whether and to what degree the duality that was once assumed as a truism of sovereignty, as though emanating from divine right, may still survive as a binding equation in a doctrine of sovereign immunity for a foreign head-of-state that would preclude this Court, as the United States Government here urges, from extending jurisdiction over the foreign government leaders here, no matter how grievous or unofficial the wrongs they are called upon to answer.

Conversely, Plaintiffs advance a more expansive theory. In essence, they posit that the concept of sovereignty has evolved, and that with it the traditional principles governing sovereign immunity changed, the world of these ideas over time scooped by the arcs of new realities above them, yielding ground to a modern age that, both in symbol and in fact, has witnessed "Diadems drop, and Doges surrender."[5] According to this view, in the ensuing progress of events and enlightened principles, the Court may find enough support to ground its exercise of judicial power over the foreign officials here.

In the final analysis, as this Court concludes, the instant case is one in which hopes outpace remedy, personal demands for justice run higher than the availability of full and immediate legal recourse in this forum. The progression of the legal precepts and theories Plaintiffs here invoke, despite critical strides marked in recent years, still trails behind human aspirations and has some time and way to go to close the gap. Consequently, on the circumstances now before the Court, the measure of justice necessarily is gauged on a scale some may feel does not fully reckon all that is seen and unseen, and whose standards may account, perhaps disproportionately, for things not altogether discernible. Nonetheless, for the reasons described below the Court accepts the State Department's Suggestion of Immunity on behalf of Mugabe and Mudenge

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[5] Emily Dickinson, *The Poems of Emily Dickinson* 158 (Martha Dickinson Bianchi and Alfred Leete Hampson, eds. 1930) (1890).

and dismisses the action as to them. Plaintiffs' motion for entry of a default judgment against ZANU-PF, however, is granted.

FACTS[6]

The complaint asserts that the ZANU-PF led by President Mugabe and the other individual defendants acting in their personal capacities and as senior officers of ZANU-PF, planned and executed a campaign of violence designed to intimidate and suppress its burgeoning but peaceful political opposition, the Movement for Democratic Change ("MDC"). Specifically, Plaintiffs charge that defendants' lawless conduct included "murder, torture, terrorism, rape, beatings, and destruction of property . . . ."[7] For reasons discussed below and critical to the legal dispute at hand, Plaintiffs stress that the violent deeds associated with this campaign were all perpetrated by defendants and other agents of ZANU-PF acting individually, not by the government of Zimbabwe nor by Mugabe and Mudenge carrying out any public mandate or official duties. The complaint and supporting materials graphically depict acts of brutality this campaign inflicted upon its intended victims.

For present purposes, the Court accepts the uncontested assertions that the violence and wrongs Plaintiffs allege fall squarely within the conduct encompassed by the ATCA and TVPA and proscribed by universally recognized human rights

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[6] The statement of facts set forth below is based on the claims set forth in Plaintiffs' complaint and in the declarations of parties and witnesses, as well as exhibits submitted in support of Plaintiffs' Motion for Judgment by Default and their Answering Brief herein. *See* Compl.; Plaintiff's Answering Brief to the Suggestion of Immunity Submitted by the United States of America, dated Apr. 23, 2001 (hereinafter "Plaintiffs' Brief"); Declaration of Paul Sweeney in Support of Plaintiffs' Brief, dated Apr. 23, 2001 (hereinafter "Sweeney Decl."). The factual allegations detailed in these documents, in light of defendants' default, are deemed true for the purposes of this proceeding.

[7] Compl. ¶ 15.

norms.[8] On this basis, the Court adopts as findings of fact that, by reason of their support for the MDC, Tapfuma Chiminya, Metthew Pfebve, and David Stevens were all extrajudicially murdered; Metthew Pfebve and David Stevens were tortured; Efridah Pfebve and Evelyn Masaiti were attacked and beaten; and all of the named and unnamed Plaintiffs were in other ways terrorized by operatives of ZANU-PF operating in concert with or significantly aided by high-ranking Zimbabwe government officials acting under color of state law.

The actions taken against these individuals were part of an organized political campaign that occurred during the four-months preceding Zimbabwe's June 2000 Parliamentary elections. The violent drive was implemented, according to Plaintiffs, by ZANU-PF members who were trained and directed from the highest levels of ZANU-PF, and who acted pursuant to Mugabe's orders given through ZANU-PF's chain of command. Moreover, this effort was designed to intimidate all of ZANU-PF's political opposition through harassment, physical attacks and even assassination of targeted individuals.

The specific acts that comprise this conduct are set forth in considerable detail in the complaint and related documents in the record. For example, Plaintiffs assert that private individuals occupying a ZANU-PF vehicle attacked MDC members in a car on their way from filing a report with the police concerning a beating of another MDC member. After severely beating the three occupants of the car, the attackers then doused two of the occupants with gasoline and set them on fire. The ZANU-PF vehicle and the perpetrators remained at the scene while the victims burned. In addition, police officers in a vehicle nearby stopped at a distance and, though observing the MDC car in flames and the burning people, made no effort to stop the attack or the ZANU-PF vehicle when it fled from the scene. Instead, after the ZANU-PF vehicle had departed, the police sought, but were too late, to render assistance to the victims. One of the individuals who

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[8] *See infra* notes 206-42 and accompanying text.

died in the attack was the late husband of the lead plaintiff in this case.

In support of their factual assertions, and as confirmation of the concerted violence and lawlessness portrayed by the incidents described in the complaint, Plaintiffs cite to contemporary international expressions of concern and condemnation of events in Zimbabwe. They point, for example, to a U.S. Senate bill passed in 2000 condemning the campaign of violence that the ZANU-PF had "orchestrated and supported," and that continued at Mugabe's "explicit and public urging".[9] Likewise, the European Parliament adopted a series of resolutions expressing concern over human rights abuses allegedly perpetrated by Mugabe and ZANU-PF and resolved to condemn "the sustained campaign of murder, violence, intimidation and harassment by President Mugabe and the ruling ZANU-PF Party against political opponents, farm workers, white farmers, and homosexuals."[10] This resolution also found that "the ongoing breakdown in the rule of law in Zimbabwe is the direct result of the renewed cycle of violence initiated by President Mugabe against his political opponents" and deplored the treatment of Zimbabwe's Chief Justice, who was forced into retirement, and death threats reported against other judges.[11] Plaintiffs also point to press reports[12] of these events, and to an Amnesty International finding that "[d]uring the election campaign leading up to the parliamentary elections in June 2000 a pattern of violations that included extrajudicial execution and torture emerged."[13]

Plaintiffs served Mugabe and Mudenge with their pleadings while the officials were in New York City attending a

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[9] Zimbabwe Democracy Act of 2000, S. 2677, 106th Cong. (2000) (enacted).

[10] Sweeney Decl., Ex. 2, Preamble A, D, F, G, ¶ 3.

[11] *Id.*

[12] *See* Sweeney Decl., Ex. 5, *60 Minutes* (CBS Broadcast, January 21 2001).

[13] Sweeney Decl., Ex. 1 at 3.

conference at the United Nations.[14] To avoid particular diplomatic immunity rules that apply within United Nations Headquarters Area,[15] Plaintiffs arranged to serve process outside the boundaries of that district. Specifically, Plaintiffs assert that they served Mugabe as he arrived at an unofficial gathering organized by a private New York group which reportedly raises money for defendants under the name "Friends of the ZANU-PF" and which has nothing at all to do with the United Nations or the United States government. According to Plaintiffs, Mugabe chose to speak at this unofficial function precisely in order to defend his actions in Zimbabwe; to galvanize support for ZANU-PF; and to lobby the American public in opposition to legislation then pending before the U.S. Senate condemning ZANU-PF's campaign of violence.

Defendants defaulted without any appearance before the Court. After Plaintiffs moved for entry of a default judgment, Mugabe and Mudenge submitted to the State Department a request for immunity. On February 23, 2001, the State Department responded by filing a Suggestion of Immunity on behalf of Mugabe and Mudenge. The Suggestion of Immunity asserts that the State Department informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Mugabe and Foreign Minister Mudenge from this suit"[16] and that "permitting this action to proceed against the President and Foreign Minister would be incompatible with the United States' foreign policy

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[14] The complaint also named Jonathan Moyo as a defendant. It appears that he was not personally served and Plaintiffs have not requested default judgment against him.

[15] *See* 22 U.S.C. § 287 Note (Agreement Between The United Nations And The United States Of America Regarding The Headquarters Of The United Nations, Art. V, Section 15) (hereinafter the "Headquarters Agreement").

[16] Suggestion of Immunity Submitted by the United States of America, dated February 23, 2001 (hereinafter the "Suggestion"), at 2-3.

interests." [17] In connection with the Suggestion, the Government now urges dismissal of Plaintiffs' claims against Mugabe and Mudenge, and an order quashing or nullifying service of process against them. The Government's request asserts three grounds in support of this result: (1) head-of-state immunity; (2) diplomatic immunity; and (3) personal inviolability attaching to both Mugabe and Mudenge. These theories and Plaintiffs' responses are discussed in turn below.

DISCUSSION

I. HEAD-OF-STATE IMMUNITY

A. ABSOLUTE SOVEREIGN IMMUNITY DOCTRINE: *THE SCHOONER EXCHANGE*

One legal manifestation of the longstanding conceptual identity of ruler and state, conveying the personification of the sovereign nation in the head-of-state, is the traditional doctrine of absolute sovereign immunity. This theory held that unless the protection were expressly waived, the sovereign state, acting through its officers and agents, was not subject to the jurisdiction of the judiciary, at least for acts taken by government agents in an official capacity. In the context of foreign nations, this principle was given expression and recognition early in American jurisprudence by the Supreme Court's 1812 decision in *The Schooner Exchange v. McFaddon*,[18] a case which "came to be regarded as extending virtually absolute immunity to foreign sovereigns."[19] There, McFaddon, claiming to be the rightful owner of an armed merchant vessel in the service of France, sought a court order to attach the ship when it sailed into an American port. Chief Justice Marshall ruled that, under an implied grant of

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[17] *Id.* at 2.

[18] 11 U.S. (7 Cranch) 116 (1812).

[19] *Verlinden v. B.V. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (citing *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926)); *see also Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943).

immunity by the United States, a public armed ship of a friendly foreign nation, though having entered territory of this country, was exempt from the exercise of jurisdiction of United States courts.

The Schooner Exchange elaborated four enduring principles which form the cornerstone of foreign sovereign immunity jurisprudence and are central to the resolution of the issues at hand. First, Chief Justice Marshall observed that the jurisdiction of a sovereign state within its own territory, which derives from the perfect equality and independence of every nation and of which the jurisdiction of its courts is a component, "is necessarily exclusive and absolute," subject to "no limitation not imposed by itself."[20]

Second, this full and absolute jurisdiction, an attribute of every sovereign, is incapable of conferring extra-territorial power and "would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects," but by "common interest impel[s] them to mutual intercourse."[21] By this statement, *The Schooner Exchange* articulates the principles of comity and reciprocity which serve as the bedrock for the doctrine of sovereign immunity:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[22]

Third, all exceptions to the nation's exercise of jurisdiction within its territories "must be derived from the consent of the

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[20] *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

[21] *Id.* at 137.

[22] *Id.*

sovereign of the territory"[23], which consent may be expressed or implied. The Court then identifies three circumstances under which every sovereign, recognizing the common interest impelling mutual cooperation, is understood to waive a part of its absolute territorial jurisdiction: (1) the exemption of the person of the sovereign from arrest or detention within a foreign territory; (2) the immunity allowed to foreign ministers, ambassadors and other diplomats; and (3) the assent to the passage of foreign troops, a subset of which is the entry of friendly foreign naval ships into domestic ports. Noteworthy in this classification, and a vital point to which this Court returns below,[24] is the distinction Chief Justice Marshall draws between the exemption conferred upon the *person* of the sovereign to be free from arrest or detention while present within a foreign territory, and, as a separate category, the immunity of diplomatic ministers abroad.

Fourth, and of particular interest here, Chief Justice Marshall admitted to some potential limitation to both the traditional identity of the sovereign and ruler and to the absoluteness of the sovereign's immunity. He noted, without expressing an opinion, the difference between "the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation."[25] As regards the former, the Chief Justice makes an observation that presaged the basis and course for later changes in the law and anticipated disputes such as that now before this Court. He remarked:

> A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to territorial jurisdiction; he may be considered as

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[23] *Id.* at 143.

[24] *See infra* notes 141-46 and accompanying text.

[25] *The Schooner Exchange*, 11 U.S. (7 Cranch) at 145.

> so far laying down the prince, and assuming the character of a private individual.[26]

Significantly, reflecting the common understanding that then conflated the sovereign nation and its ruler, Chief Justice Marshall throughout the opinion refers to the state and the "prince" as one, and describes the state, anthropomorphically transfigured in the person of the sovereign prince, as "he" and "him".[27] Both doctrinally and in practice, because the sovereign and the head-of-state were deemed to be the same, the fusion translated into a principle of immunity that, under customary international law, developed and was recognized as similarly unitary and coextensive.[28] Prior to 1976, the case law and commentary record very few, if any, instances in which a claim for exercise of jurisdiction over a head-of-state was asserted personally against the ruler of a nation, separate and apart from the sovereign state the leader personified.[29]

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[26] *Id.*

[27] *See, e.g., id.* at 137, 144 (referring to a public armed ship, the Court noted that it "acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity."); *see also supra* note 22 and quote in accompanying text.

[28] *See, e.g., Restatement (Second) of Foreign Relations Law* § 65, *et seq.* (1965). According to the Restatement § 66, the definition of head of state equated to that the state itself "The immunity of a foreign state under the rule stated in section 65 extends to . . . its head of state and any person designated by him as a member of his official party . . ." Immunity under § 65 applied to: "(a) the state itself; (b) its head of state . . .; (c) its government or any governmental agency; (d) its head of government . . .; (e) its foreign minister . . .; (f) any other public minister, official or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state . . .; (g) a corporation created under its laws and exercising functions comparable to those of an agency of the state."

[29] *See Lafontant v. Aristede*, 844 F. Supp. 128, 136 (E.D.N.Y. 1994); *see also* Lord Gore-Booth, *Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1975) (hereinafter

B. RESTRICTIVE IMMUNITY

1. The Tate Letter

The theory of absolute sovereign immunity, incorporating the conceptual unity of sovereign and ruler that *The Schooner Exchange* articulated, served as controlling principle in foreign state immunity controversies in this country until 1952. As the doctrine was ultimately formulated by the Supreme Court,

> it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction [in actions against foreign states], that the courts should not act as to embarrass the executive arm in its conduct of foreign affairs. 'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' "[30]

Thus, upon a formal assertion by the Executive Branch that a foreign state or entity sued in the United States was entitled to sovereign exemption from jurisdiction, the courts were obligated to honor the total immunity that recognition conferred and to dismiss the action.[31]

By 1952 several developments had converged to bring about substantive change away from the absolute sovereign immunity doctrine. Following significant increases in international commerce and changes in state economic systems that occurred after World War II, many countries altered their foreign relations practices to conform to a

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"*Satow's Guide*"); Jerrold L. Mallory, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev. 169, 170-73 n.10 (1986) (hereinafter "Mallory").

[30] *Hoffman*, 324 U.S. at 35 (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882) and *Ex Parte Peru*, 318 U.S. at 588.

[31] *See id.*

restrictive theory of sovereign immunity.[32] Under this approach, an exception to state immunity was carved for foreign sovereign activities that were strictly commercial, thus limiting the absolute exemption from exercise of national jurisdiction over foreign states solely to disputes arising from public actions inherently within the sphere of governmental functions.

The change was prompted partly in response to the rapid rise in the number of countries that had adopted socialist or communist governments that nationalized major industries and conducted international commerce through state-owned or controlled entities.[33] These means of trade produced competitive disadvantages and resulting injustices for other states and private parties that engaged in commerce with state-dominated enterprises. For example, in litigation arising from commercial disputes over the non-performance of contracts or other wrongful conduct, it became commonplace for these entities to hide behind the near-fiction that they were the state, and to assert sovereign immunity as an absolute defense, thereby erecting a shield against all liability for their obligations and damages.[34]

In the United States, a doctrinal watershed occurred in 1952 with the Department of State's promulgation of a new policy enunciated in a communication to the Justice Department. The Tate Letter, as it was called, put other nations on notice that the United States, in considering foreign governments' requests for sovereign immunity, would thereafter follow the restrictive theory of sovereign immunity.[35] The Tate Letter

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[32] *See Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 701-02 n.15 (1976).

[33] *See generally id.*

[34] *See, e.g., id.* at 700-03, *The Katingo Hadjipatera*, 40 F. Supp. 546 (S.D.N.Y. 1941).

[35] *See* Letter from Jack B. Tate, Acting Legal Adviser of the United States Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. No. 678 at 984 (June 27, 1952) (hereinafter the "Tate Letter").

explicitly declared that the decisive considerations impelling the policy shift comprised two elements: the increasing practice on the part of (1) governments engaging in (2) commercial activities.

These developments made necessary a means to enable persons doing business with state enterprises "to have their rights determined in the courts."[36] Significantly, neither the Tate Letter, nor other authority then reflecting on generally prevailing practice or customary international law, made mention of controversies involving claims of individual immunity for sovereigns, represented in the person of the country's ruler, from the jurisdiction of the courts over matters relating to non-governmental transactions, commercial or otherwise, undertaken in their private or public capacities.[37]

In practice, the State Department implemented the modified policy by issuing guidance, in the form of "suggestions of immunity", in particular court cases in which the United States deemed its intervention appropriate. In those cases, the courts, in accordance with the Supreme Court's mandate in *Ex Parte Peru*,[38] uniformly deferred to the Executive Branch's assertions as conclusive on judicial determinations of foreign state immunity.

But the practical application of the Tate Letter policy and the results it yielded proved unsatisfactory. The distinction

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[36] *Id.*; *see also Verlinden*, 461 U.S. at 487 (noting that in the theory of restrictive immunity adopted by the United States by means of the Tate Letter "immunity is confined to suits involving foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts").

[37] *See* Joseph W. Dellapenna, *Head-of-State Immunity—Foreign Sovereign Immunities Act—Suggestion by the Department of State*, 88 Am. J. Int'l L. 528, 529 (July 1994) (hereinafter "Dellapenna") (noting the absence of precedent prior to the enactment of the Foreign Sovereign Immunities Act in 1976 for a doctrine of immunity for foreign heads-of-state as distinct from sovereign immunity for the state generally); *see also* Mallory, 86 Col. L.Rev. at 171.

[38] 318 U.S. at 578.

between a state's commercial activities and strictly governmental functions was not always clear. Often, the State Department's immunity determinations were not based on consistent or coherent standards, nor on established internal adjudicatory procedures. At times these determinations worked to the State Department's own embarrassment; to the displeasure of the private and public commercial interests sacrificed to diplomatic and political considerations; or to the growing discomfort and uninhibited consternation of the courts.[39] State Department "suggestions" often were issued on the basis of the foreign government's political and diplomatic pressures on the Executive Branch and similar situations yielded different outcomes.[40] Moreover, the courts were left without objective rules of law to apply in cases where the foreign state did not request immunity, or the State Department chose not to intervene.[41] As a consequence, sovereign immunity determinations were made by two branches of the government based on varying standards and considerations not always clearly compatible or uniformly applied.[42] The perceived politicization of the sovereign immunity process engendered mounting concern all around.

2. The Foreign Sovereign Immunities Act

General dissatisfaction with application of the Tate Letter's policy change motivated the passage of the Foreign Sovereign

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[39] *See, e.g., Jet Line Servs., Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1169 (D. Md. 1978).

[40] *See generally* Shoba Varughese George, *Head of State Immunity in the United States Courts: Still confused After All These Years*, 64 Fordham L. Rev. 1051, 1058-59 (Dec. 1995) (hereinafter "George").

[41] *See* Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcommittee on Administrative Law, and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 24, 27 (1976) (hereinafter "Hearings on H.R. 11315"); *see also Verlinden*, 461 U.S. at 487-88; George, 64 Fordham L. Rev. at 1058-59.

[42] *See Verlinden*, 461 U.S. at 487-88.

Immunities Act of 1976 (the "FSIA" or the "Act").[43] The statute, intended to adopt "comprehensive rules governing sovereign immunity",[44] embodied two major objectives. It established as United States foreign relations practice the restrictive doctrine of sovereign immunity enunciated in the Tate Letter, thereby strictly limiting foreign states' immunity from the jurisdiction of United States courts to actions grounded on public or governmental functions. Accordingly, the Act denied sovereign immunity to foreign public entities for disputes arising out of their commercial ventures that are no different from ordinary private business transactions. The FSIA's major departure was its removal of the State Department's former role in the foreign state immunity process: it transferred "the determination of sovereign immunity from the executive branch to the judicial branch."[45]

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[43] *See* 28 U.S.C. § 1603. In the principal report reciting the Act's legislative history, Congress noted that the Tate Letter had "posed a number of difficulties. From a legal stand point, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts .... From a foreign relations standpoint, the initiative is left to the foreign state .... From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign sovereign will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 8-9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607 (hereinafter the "H.R. Report").

[44] H.R. Report, at 12; *Verlinden*, 461 U.S. at 495 n.22.

[45] H.R. Report, at 7; *see also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990) ("[t]he principal change envisioned by the statute was to remove the role of the State Department in determining immunity"); *Republic of the Philippines v. Marcos*, 665 F. Supp. 793, 797 (N.D. Cal. 1987) ("The power of the executive to determine when courts may exercise jurisdiction over foreign sovereigns has been abolished ...."); *but cf. Lafontant v. Aristede*, 844 F. Supp. at 136; *supra* notes 107-13 and accompanying text.

Like the Tate Letter whose policy shift it codified, the intent of the FSIA as manifested in its text and legislative history evinces preoccupation with "commercial activities" of "foreign states" and with according protection to corresponding interests of litigants who have dealings, and are engaged in legal disputes, with a "foreign government entity."[46] Instructive in conveying the distinction expressed during Congress' deliberations on the FSIA is the testimony on behalf of the Executive Branch by a witness from the Department of Justice. Describing how the proposed legislation would operate to permit suits in United States courts against foreign state-owned entities—such as Lufthansa, West Germany's national airline—that were engaged in ordinary commercial activities, he clarified that: "Now we are not talking, Congressmen, in terms of permitting suit against the Chancellor of the Federal Republic . . . [t]hat is an altogether different question."[47]

That overarching concern with a foreign state's ordinary commercial transactions is given expression in the FSIA's text and legislative record in several ways. First, in its legislative findings, Congress declared that "the determination by United States courts of the claims of *foreign states* to immunity would serve the interests of justice and would protect the rights of both *foreign states* and litigants in United States courts."[48] Further, Congress noted that under international law "*states* are not immune from the jurisdiction of foreign courts insofar as their *commercial activities* are concerned . . . . [C]laims of

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[46] *See* George, 64 Fordham L. Rev. at 1075 n.193 (citing H.R. Report, at 15-16 for examples of the kinds of "agencies or instrumentalities" that generated the FSIA's concerns: "state trading companies, mining enterprises, airlines, steel companies, central banks, export associations, government procurement agencies, and ministries").

[47] Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 16 (1976) (statement of Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice).

[48] 28 U.S.C. § 1602 (emphasis added).

foreign states to immunity should henceforth be decided by courts of the United States... in conformity with the principles set forth in [the Act]."[49] In this connection, substantial deliberation in the drafting and debate was devoted to the legal and practical difficulties encountered in defining and distinguishing between public and private commercial activities.[50]

Second, the integral connection of the immunity exclusions to both "commercial activities" and "foreign states" is further underscored by the Act's language defining "foreign state." The context the statute reflects is couched in words imbued with commercial purpose and usage. The term "foreign state" is meant to encompass an "agency or instrumentality of a foreign state", which in turn is defined as any entity "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political division thereof."[51] Apparently, Congress intended this definition to be exclusive. The House Subcommittee, in its report on the bill, indicated "an entity which does not fall within the definitions of § 1603(a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State Court."[52]

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[49] *Id.* (emphasis added).

[50] *See* Hearings on H.R. 11315, at 53 (recording the State Department Legal Advisor's observation that: "We realize that we probably could not draft legislation which would satisfactorily delineate that line of demarcation between commercial and governmental. We therefore thought it was the better part of valor to recognize our inability to do that definitively and to leave it to the courts with very modest guidance. For example, the courts would inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments.").

[51] 28 U.S.C. § 1603. *See supra* note 46 for examples of the types of state entities contemplated by the Act.

[52] *See* H.R. Report, at 15.

Third, the Act adopts several specific exemptions as to which, depending on the particular activity, "a foreign state" would no longer be entitled to assert immunity from the jurisdiction of courts in the United States. With regard to the commercial exception, it provides that sovereign immunity is not available in any case

> in which the action is based upon a *commercial activity* carried on in the United States *by the foreign state*; or upon an act performed in the United States in connection with a *commercial activity of the foreign state* elsewhere; or upon an act outside the territory of the United States in connection with a *commercial activity of the foreign state* elsewhere and that act causes a direct effect in the United States.[53]

In determining the scope of commercial activity the Act contemplates that the nature of such activity "shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[54]

The FSIA also created an exception applicable to certain torts encompassing actions

> in which money damages are sought *against a foreign state* for personal injury or death, or damage to or loss of property, occurring in the United States and *caused by* the tortious act or omission of *that foreign state* or of any official or employee of *that foreign state* while acting within the scope of his office of employment[55].

Fourth, Congress evidenced concern that United States sovereign immunity practice "conform to the practice in virtually every other country."[56] The theory and practice of foreign state immunity then understood by the community of

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[53] 28 U.S.C. § 1605 (emphasis added).

[54] 28 U.S.C. § 1603(d).

[55] 28 U.S.C. § 1605(a)(5).

[56] H.R. Report, at 7.

nations and applied as customary international law, similarly reflected paramount concern over foreign entities' commercial activities and embodied rules empirically deriving from and addressing that context.[57]

Finally, language in the legislative history indicates that Congress intended to devise rules to resolve claims of sovereign immunity of foreign states without in any way affecting established practice governing suits involving diplomatic or consular representatives.[58]

Palpably absent from the FSIA legislative history and prior practice is any specific reference to the particular issues in contention before this Court: (1) the scope of FSIA jurisdictional exemption, if any, intended to reach: (a) individuals, as opposed to state "agencies or instrumentalities", in particular, (b) the head-of-state, as distinct from the state itself; (c) private unofficial acts, as distinguished from actions attributable to the foreign state taken by government officials within the scope of their public duties; (d) private conduct of non-state persons or entities with which the head-of-state or other high ranking government leaders may be affiliated; and (2) as regards consideration of the foregoing issues, the extent of any remaining role the Department of State may play in suggesting foreign sovereign immunity in actions before the courts, and the effect the courts should accord to such expressions of interest made on behalf of the Executive Branch.

In fact, during the fifteen years that spanned the issuance of the Tate Letter and the enactment of the FSIA the bulk of sovereign immunity litigation recorded, not only in United States courts but in other countries, entailed commercial

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[57] *See* 28 U.S.C. § 1602; Tate Letter, 26 Dep't State Bull. at 984; *Satow's Guide* at 9 ("As regards the immunities of the foreign state itself, many states have developed complex and detailed rules under which these immunities are restricted in cases which may be broadly described as 'commercial'."); George, 64 Fordham L. Rev. at 1057.

[58] *See* H.R. Report, at 21.

disputes involving foreign state public entities.[59] In a compilation of sovereign immunity decisions covering this period, the State Department reported only two instances in which immunity determinations related specifically to suits brought against heads-of-state.[60] And the limited precedent that did exist may suggest that the sovereign officials there may have been named routinely, either for tactical pleading purposes or as surrogates for the state itself.[61]

In this precedential void, as Plaintiffs here acknowledge, the courts, on the few occasions in which the principle of sovereign immunity was asserted in connection with an action filed against a head-of-state, regarded the conceptual issue as subsumed within the recognized principle of absolute sovereign immunity for states and governed by *The Schooner Exchange* doctrine. This treatment suggested the existence of a unified theory of sovereign immunity integrating the traditional notion that the sovereign and its ruler were one and the same, concepts that had not yet branched into distinct doctrines subject to their own separate policies, standards and applications.[62]

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[59] *See Dunhill*, 425 U.S. at 702 (noting the "enormous increase in the extent to which foreign sovereigns had become involved in international trade"); *see also Victory Transp., Inc. v. Comesarea Gen. de Abasteumientos y Transportes*, 336 F.2d 354, 356 (2d Cir. 1964).

[60] *See* Mallory, 86 Colum. L. Rev. at 175 n.26 (citing report in 1977 Dig. U.S. Prac. Int'l L. 1017).

[61] *See id.*; *see also* Dellapenna, 88 Am.J. Int'l L. at 530 ("The practice in courts abroad was only somewhat more finite than these few American precedents, although the foreign decisions are hardly more numerous.").

[62] *See, e.g.*, Dellapenna, 88 Am. J. Int'l L. at 529 (noting that cases involving foreign heads of state were generally decided by courts granting absolute immunity as derived from the recognized strands of state immunity and diplomatic immunity: "There was no precedent for a doctrine of substantive immunity for foreign heads of state (as distinct from the doctrine of sovereign immunity generally) until after the enactment of the [FSIA]."); George, 64 Fordham L. Rev. at 1055 ("Historically, sovereign immunity for

The courts' view in this country was indeed consistent with prevailing norms and practices then accepted abroad as customary international law. One leading authority, referencing the growing volume of precedents and detailed rules reflecting restrictions promulgated by governments to limit claims of foreign state immunity, noted: "[b]ut none of this large and complex body of international law has been drawn up with the position of heads of state in mind."[63]

The central issue left unaddressed by legislative history is the one the parties before the Court here argue: whether the FSIA adopted an integrated doctrine of foreign state immunity, rescinding in its entirety and in all cases the practice of court deference to the State Department's intercessions, or whether a distinct branch of absolute immunity applying uniquely to heads-of-state survived the Act. To this Court, the dearth of pre-FSIA authority distinctly addressing head-of-state immunity casts substantial doubt over the proposition that in enacting the FSIA Congress intended to enunciate a far-reaching substantive redirection of United States international relations policy in the form of a uniform rule of law to govern all assertions of foreign immunity, including

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states and heads-of-states immunity were considered one and the same.").

[63] *Satow's Guide* at 9; *see also* Mallory, 86 Colum. L. Rev. at 177 ("While a survey of the international community's approach to head of state immunity reveals wide agreement that heads of state are entitled to some immunity, there is no consensus on the extent of that immunity."). In the United Kingdom, the State Immunity Act, which was enacted in 1978 and serves as the model for similar legislation in other British Commonwealth countries, the law defines a foreign state as including the head-of-state and head-of-government and related entities. *See* State Immunity Act, 1978, 26 & 27 Eliz. 2, Ch. 33, § 14(1), *reprinted in* 17 I.L.M. 1123, 1127-29 (1978) (hereinafter the "State Immunity Act"). The British Act also confers upon heads-of-state the protections of diplomatic immunity by applying to them the Diplomatic Privileges Act of 1964, 12 & 13 Eliz. 2, Ch. 81. State Immunity Act, § 20. *See* Mallory, 86 Colum. L. Rev. at 178 n.33. In France, heads-of-state are accorded more extensive immunity comparable to that granted to diplomatic representatives. *See id.* at 177.

head-of-state immunity. At the time of the FSIA's adoption, no widely accepted international practice established a separately standing principle of head-of-state immunity. In fact, prior to 1976 the doctrine of sovereign immunity was generally understood to encompass solely state immunity. Consequently, any reference to a head-of-state immunity "doctrine" as a concept distinct from foreign state immunity is a construct that does not arise in the case law and commentary as a specifically identified and widely recognized legal principle until after 1976.[64]

Thus, for Congress to have purposefully codified a head-of-state immunity rule would have required application of the FSIA to unique circumstances that were then relatively unencountered and undefined, not only domestically but abroad. To that degree such a pronouncement by Congress would have constituted a significant unilateral departure from international practice that, if so considered and designed would hardly have gone unnoticed and unmentioned by other governments.

Authorities recognize that the growth of international law is evolutionary. It expands by accretion as consensus develops among nations around widely recognized customs, practices and principles, and not by patchwork elevation of any one country's ad hoc pronouncements.[65] Thus, any dramatic deviation from accepted international norms legislated by any single state without reference to widely accepted customary rules would be inconsistent with this principle. Chief Justice Marshall articulated this notion, also in *The Schooner Exchange*:

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[64] *See* Dellapenna, 88 Am. J. Int'l L. at 529-30 (noting that prior to the FSIA "We should perhaps refer to the supposed substantive immunity of foreign heads of state as having been more of a notion than a doctrine.").

[65] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 434-35 (1964); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980).

> A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.[66]

With a legislative record devoid of any explicit contrary expression, a deliberate purpose to depart from generally prevalent international customs and practices as regards immunity for heads-of-state should not be ascribed to Congress.

The substantial disarray and division in the courts' practice following the enactment of the FSIA still prevails regarding the treatment accorded to head-of-state immunity and various other related issues emanating from the Act. In fact, the Second Circuit and other courts concur only in that "[t]he scope of this [head-of-state] immunity is in an amorphous and undeveloped state."[67] In this Court's reading of relevant precedent, it thus would be an overstatement to say that Congress could have envisioned legislating to address a situation whose inherent problems, complexities and exact dimensions were not known or fully comprehended at the time.

Since 1976, however, some conceptual fissures have separated the ancient notion that equated the head-of-state to the state itself. There is now growing recognition that the sovereign is solely the state and that the nation's ruler is a distinct entity.[68] In this regard, substantial case law has begun

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[66] 11 U.S. (7 Cranch) at 137.

[67] *In re Doe v. United States*, 860 F.2d 40, 44 (2d Cir. 1988) (citation omitted); *see also In re Grand Jury Proceedings, John Doe # 700*, 817 F.2d 1108, 1110 (4th Cir. 1987) (the "exact contours of head-of-state immunity . . . are still unsettled").

[68] *See Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) (holding that Marcos's illegal acts were not official acts pursuant to his authority as President of the Philippines, the court stated Marcos "was not the state, but the head of state, bound by the laws that applied to him");

to develop, identifying issues singularly associated with head-of-state immunity and demanding treatment under a set of rules reflecting that uniqueness. But the courts are still grappling with the definition and scope of that doctrinal separation. Neither a clear consensus nor a controlling standard that can be considered to reflect customary international law has emerged from the courts' consideration of those issues.

3. Post-FSIA Effects and Developments

A substantial increase in litigation brought against foreign states was recorded after the FSIA's enactment.[69] This development may have been a by-product not only of cases engendered by the clarifying rules the Act promulgated, but of the continuing rise in foreign trade conducted by states and their public entities. A phenomenon of particular significance to the action at bar is noteworthy in this post-FSIA trend: the substantial incidence of claims asserted directly against heads-of-states, as opposed to the state itself, often relating to conduct alleged to be personal and unconnected with any governmental duties.[70]

Jimenez v. Aristeguieta, 311 F.2d 547, 557 (5th Cir. 1962) ("Even though characterized as a dictator, appellant was not himself the sovereign—government—of Venezuela within the Act of State Doctrine. He was chief executive, a public officer, of the sovereign nation of Venezuela."); *see also United States v. Noriega*, 746 F. Supp. 1506, 1522 (S.D. Fla. 1990); *Satow's Guide*, at 9 ("A clear distinction is drawn in the law of many states, and implied in that of others, between the foreign state as a legal entity and the head of state of such state as an individual to whom a very high degree of privilege and immunity remains due."); Mallory, 86 Colum. L. Rev. at 197 n.10 ("Today heads of state are no longer viewed as the actual state, although in some cases they are regarded as personification of the state. States and the rulers are separate entities; states, not their rulers, are generally viewed as the primary subjects of international law.").

[69] *See* Dellapenna, 88 Am. J. Int'l L. at 531.

[70] *See id.* ("In the upsurge of litigation against foreign states and foreign-state-related entities in the United States that followed the enactment of the Foreign Sovereign Immunities Act in 1976, a

Three circumstances may explain this development. First, some plaintiffs, aware that suits naming the state directly are explicitly barred by the FSIA, either for tactical effect or to test the substantive contours of the Act's exceptions, have sought to assert theories of liability that extend to foreign officials not only as "agencies or instrumentalities" of the state, but in their personal capacities.[71] Second, as international trade and opportunities to expand wealth in global markets has continued to expand, more heads-of-state themselves may be engaging in private foreign investment and commercial ventures funded by their personal and family fortunes.[72]

A third phenomenon, of more recent roots, is closer on point. Increasingly, the world's nations have come to give recognition and legal expression to new realities about the actions of state officials. These concerns have taken front-stage roles in international relations. Many major crimes and sources of personal injuries, such as genocide, acts of terrorism and abuses of human rights, honor no bounds of decency, and respect no national borders. People and the nations they comprise are more conscious that, like the effects of subterranean faults, violations of international law and state denials of universally recognized fundamental liberties in one country can reverberate harmfully in others.

As a by-product of this greater awareness, a deeper wedge has been driven in the old sovereign equation, in recognition that it is not the "state" as a collective abstraction, but rather live persons, with or without the badge of the state, who commit atrocities in violation of common norms, and that high-ranking government officials, even heads-of-state

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rather remarkable number of suits (given prior dearth of such suits) was filed against heads of foreign states.").

[71] *See, e.g., Chuidian*, 912 F.2d at 1106; Dellapenna, 88 Am. J. Int'l L. at 530.

[72] *See, e.g., First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1112-13 (D.D.C. 1996); *Lasidi, S.A. v. Financiera Avenida, S.A.*, No. 5864/52 (N.Y. Sup. Ct.) (hereinafter "*Lasidi*") (as reported by David Berrely, *Missing Millions*, Nat'l L.J., August 29, 1983 at 1).

themselves, may be among the persons prone from time to time to indulge in lawlessness. Finally, to address these concerns and changing circumstances some adjustments in the practices governing relations among states became necessary. To these ends, a considerable body of new rules emerged, both domestically and internationally, in large measure during the years soon after the enactment of the FSIA.[73]

As a consequence, with greater incidence, foreign state officials are accused of wrongful conduct arising not just from private commercial ventures, but from alleged criminal activity and abuses of human rights in violation of customary international law.[74] In fact, the broad body of substantive law and behavior constituting recognized violations of international norms, which correspondingly has given rise to claims such as the one at bar for enforcement of those rights, has expanded significantly in more recent years.[75]

Concomitant with the increase in the body of law defining rights, is another related major development. Efforts to define the concept of international crime and the reach of human rights, and to hold violators accountable, would amount to no more than emblematic gestures unless those reforms were accompanied by a corresponding dismantling of the long-standing doctrinal bastions that have impeded the exercise of domestic and international jurisdiction over state officials for violation of the new standards. And in fact, just such relaxation of the old barriers has occurred; material chips have been scored in the ramparts foreign government agents once routinely erected as absolute defenses against litigation challenging their private conduct as crimes against humanity or other egregious abuses of human rights contravening international norms.[76] The world's nations, through treaties,

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[73] *See infra* notes 76-85 and accompanying text.

[74] *See* George, 64 Fordham L.Rev. at 1051-52, 1054; Dellapenna, 88 Am. J. Int'l L. at 529-31.

[75] *See id.*

[76] *See, e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, art. 27 (hereinafter "Rome Statute of the I.C.C.")

conventions and declarations, have established standards defining as violations of customary international law, practices such as genocide, crimes against humanity, torture, forced disappearance, extra-judicial killings and terrorism.[77]

To promote enforcement of these standards, the international community has mobilized in establishing mechanisms, modeled after the Nuremberg War Crimes Tribunal following World War II, such as the International Criminal Tribunals for the Former Yugoslavia and for Rwanda created by the United Nations.[78] Most recently, they adopted the statute of the

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("This Statute shall apply to all persons without distinction based on official capacity as Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for a reduction of sentence.").

[77] *See, e.g.*, The Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948 78 U.N.T.S. 277 *entered into force* Jan. 12, 1951, *ratified by the United States effective* Feb. 23, 1989; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985), *entered into force* June 26, 1987, *ratified by the United States effective* Oct. 21, 1994, 34 I.L.M. 590 (1995) (hereinafter the "Convention Against Torture"); *see also Restatement (Third) of Foreign Relations Law*, Pt. 2.

[78] *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th Mtg., U.N. Doc. S/INF/49 (1993) (the Yugoslavia Tribunal); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/INF/50 (1994) (the Rwanda Tribunal). The Tribunals' prosecution of sitting and former heads-of-state and high-ranking government officials, for genocide, crimes against humanity and other violations of international law attest to the remarkable recent strides and the far-reaching implications of these developments in fostering the establishment of international legal norms. The Yugoslavia and Rwanda Tribunals, though creatures of U.N. Security Council resolutions, both have been legitimized, by way of implementing legislation, as playing an important role in the legal machinery of the United States for the Tribunals' specified purposes. *See* Judicial Assistance to the International Tribunal for Yugoslavia and to the International Tribunal for Rwanda, Pub. L. No. 104-106, 110 Stat. 186, 485 (1996).

International Criminal Court.[79] The United States itself has joined in some of these developments by ratifying the Convention Against Torture in 1994 and enacting the TVPA in 1991 that empowered victims to file suits against acts of official torture and extrajudicial killings occurring in foreign states.[80] Judicially, in 1980, the Second Circuit infused vitality into the ATCA,[81] which had lain dormant on the books from virtual desuetude since 1789. In *Filartiga*,[82] the Court of Appeals construed the law as "opening the federal courts for adjudication of the rights already recognized by international law,"[83] and held that "an act of torture committed by a state official against one held in detention

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As such, the Tribunals bear the imprimatur of both international consensus and domestic implementing legislation. In this respect, the Tribunals' mandates, functions and sources of authority are altogether different from those of a federal district court exercising its circumscribed authority in a civil matter pursuant to its grant of limited jurisdiction in Article III of the United States Constitution. Federal court jurisdiction cannot lay claim to genesis from international consensus nor to legislation that specifically authorizes all of the relief Plaintiffs seek here. Furthermore, recognizing that the Court's authority is constitutionally derived reinforces the delicate balance that exists between the judiciary and Executive Branch in matters of foreign relations.

[79] *See* Rome Statute of the ICC, art. 27.

[80] Pub. L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 Note).

[81] 28 U.S.C. § 1350.

[82] *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-89 (2d Cir. 1980); *see also Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996) (declaring subject matter jurisdiction existed under the ATCA and TVPA in an action against the purported head-of-state of the Bosnian-Serb entity for acts of genocide, torture and other violations of international law); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (applying the ATCA to acts ascribed to Guatemala's Defense Minister); *Noriega*, 746 F. Supp. at 1506 (United States took unilateral action to capture Panama's dictator in Panama and prosecute him in the United States, on accusations of trafficking in narcotics in violation of United States criminal statutes, which were applied to punish the extra-territorial effects of Noriega's conduct).

[83] *Filartiga*, 630 F.2d at 887.

violates established norms of the international law of human rights, and hence the law of nations."[84]

The net results of these developments bear upon the issues before this Court. They have caused some breach in the theoretical walls that once absolutely impeded the exercise of national jurisdiction against heads-of-state and other foreign officials for private conduct that violates clear and unambiguous norms of established international law. As a consequence, it has become harder for foreign officials accused of egregious personal misdeeds contravening customary international standards to find escape holes in which to crawl in flight from the arm of international law and its associated implementing domestic statutes. Private parties in rising numbers, such as Plaintiffs here, thereby have been encouraged to institute claims against such foreign state officials asserting damages caused by their personal derelictions. Importantly, to some degree, progression in the international sphere either mirrors or has been driven by comparable evolution of principles on the domestic front. For, inroads have been recorded against the absolute immunity from suit that heads-of-state once enjoyed at home.[85]

Nonetheless, many of these developments are incipient and still relatively modest. Whatever the trend, and however heartening it may be to the victims of gross brutality and to the human spirit's yearnings and strivings for justice, this progress by no means signifies, as confirmed by the intense arguments Plaintiffs and the Government advance before this Court, that a body of widely recognized principles exists, either in this country or internationally, clearly delimiting the bounds within which private claims against foreign heads-of-state and other high officials may be prosecuted in national courts. In this formative environment, agreement

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[84] *Id.* at 880.

[85] *See, e.g., Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974); *but cf. Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (former president entitled to absolute immunity from liability predicated on official acts).

may exist with regard to one general proposition: that developments in the criminal context, whether concerning former or sitting government leaders, have advanced more definitively than the parameters defining permissible jurisdiction over sitting heads-of-states extending to personal conduct in civil matters.

4. FSIA Case Law

The conceptual distance that still exists between human expectations and the law's bestowals in relation to the international concepts here at issue is best illustrated by two conflicting camps into which construction and application of the FSIA have branched. One, which Plaintiffs advocate upon the Court, holds that the FSIA unequivocably shifted from the State Department to the courts responsibility for determining all claims of foreign immunity, including those filed on behalf of heads-of-state. Plaintiffs contend that this theory is reflected in the approach the Ninth Circuit adopted in *Chuidian*.[86]

A second strand, pressed by the Government and articulated by the Eastern District of New York in *Aristede*,[87] holds that the FSIA does not apply to claims of immunity asserted by heads-of-state. As to heads-of-state immunity, this view maintains, pre-FSIA common law practice remains valid, constraining the courts to accept as conclusive the State Department's suggestions of immunity. For the reasons indicated below, this Court concludes, though not fully accepting some of *Aristede's* implications nor rejecting all aspects of *Chuidian*, that the analysis in *Aristede* better accords with this Court's reading of the FSIA's text, purposes and legislative history. The *Aristede* outcome is also more consistent with other cases precisely on point, as well as with prevailing practices of customary international law as reflected in United States jurisprudence.

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[86] *See* 912 F.2d 1095.

[87] *See* 844 F. Supp. 128.

a. *Chuidian*

Plaintiffs contend, relying heavily on *Chuidian* and the line of cases following it, that the FSIA applies so as to authorize the courts to adjudicate all claims of immunity not only by foreign governments, but by individual government officials, including heads-of-state, and that courts need not defer to State Department suggestions of immunity because the Act stripped the Executive Branch entirely of its former role in that process.

A full review of the facts in *Chuidian* is essential to an understanding of the actual scope of the Ninth Circuit's holding and to a full assessment of Plaintiffs' contention here. *Chuidian* was brought by a Philippine citizen who owned various business interests in California. As part of a settlement of litigation commenced during the rule of former President Ferdinand Marcos between Chuidian and a Philippine government export loan agency, the Philippine National Bank, also a state-owned entity, issued an irrevocable letter of credit to Chuidian on behalf of the export agency. Following the overthrow of Marcos, the new government appointed a Commission on Good Government charged with recovering the wealth Marcos had unlawfully accumulated and held abroad.[88]

Acting in accordance with this mandate, Raul Daza, a member of the Commission and a named defendant in the case, instructed the Bank not to honor Chuidian's letter of credit, purportedly because the settlement it secured was a fraudulent transaction whose purpose was to induce Chuidian not to reveal information about Marcos's personal interests in Chuidian's business enterprises. When the Bank refused to make payment on the letter of credit, Chuidian sued, naming Daza among the defendants. Among his claims, Chuidian asserted intentional interference in his contractual relations with the Bank.[89]

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[88] *See Chiudian*, 912 F.2d at 1097.

[89] *See id.*

Though sued individually, Daza argued that he was entitled to sovereign immunity because he qualified as an "agency or instrumentality of a foreign state" as defined by FSIA § 1603(b). Chuidian countered that the Act was not meant to cover individuals sued for acts taken in their private capacities, or alternatively, that Daza and the conduct in question were otherwise encompassed by the FSIA's exceptions to sovereign immunity.[90] On this theory, because the Act provided the sole source of recognition of sovereign immunity, and Daza did not satisfy the definition of a "foreign state," his claim to immunity could not be granted.

The Government, in a "Statement of Interest"[91] issued by the Department of State on Daza's behalf, agreed with Chuidian's argument. It maintained that, in fact, as a private person, rather than a state-owned corporation or other entity, Daza was not covered by the Act, but that, as a representative of the state engaged in official business in the underlying transaction, he was nonetheless eligible to be granted immunity at the State Department's behest under pre-FSIA common law doctrine.[92] According to the Government's view, the Act replaced the common law sovereign immunity rules only in the context of claims brought against a foreign state or its instrumentalities; otherwise, as to individual government officials whose acts are not specifically covered by the Act, the common law sovereign immunity doctrine, as defined in the Restatement (Second) of Foreign Relations Law § 65[93] and contemplating the binding effect of the State

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[90] *See Chuidian*, 912 F.2d at 1099.

[91] The Government distinguishes between an assertion in a suggestion of immunity, which it contends confers absolute common law immunity that must be given conclusive effect by the courts, and a "statement of interest", which it deems akin to an amicus brief in which it argues that a particular non-binding analysis should be considered by the court in assessing an official's claim for immunity. *See* Government's Memorandum of Law in Reply to Plaintiffs' Answering Brief Concerning Defendants' Immunity, dated June 1, 2001, (hereinafter "Gov't Reply"), at 16.

[92] *See id.*

[93] *See supra* note 28 for the text of Restatement § 65.

Department's declarations of sovereign immunity, remained valid.[94]

The Ninth Circuit acknowledged that the Act was ambiguous in regards to its application to individuals.[95] In the court's reading, the legislative history suggested that Congress was concerned primarily with governmental organizations acting on behalf of foreign states and did not explicitly contemplate individuals sued in that capacity.[96] In fact, one district court in the Ninth Circuit already had held precisely as much.[97] Nonetheless, the Circuit Court rejected the positions advanced by Chuidian and the Government. It noted that while the Act did not expressly include individuals within the definition of "foreign state", it also did not explicitly exclude them. Absent clear indication that the Act precluded immunity claims by natural persons, the court concluded that, as a codification of prevailing common law principles that extended immunity to certain individual foreign officials, the FSIA did cover Daza.[98]

In rejecting the Government's contention that the FSIA effectively bifurcated the sovereign immunity process—the same argument the Government urges before this Court—the *Chuidian* court observed that "the principal distinction between pre-1976 common law practice and post-1976

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[94] *See Chuidian*, 912 F.2d at 1101.

[95] *See id.*

[96] *See id.*

[97] *See Republic of Philippines v. Marcos*, 665 F. Supp. 793, 797 (N.D. Cal. 1987) (noting that the terms used in § 1603(b) —"agency" "instrumentality", "entity", and "organ"—clearly indicated the Act's intent to exclude natural persons).

[98] *See Chuidian*, 912 F.2d at 1101. For this proposition, the Ninth Circuit found support in other cases it cited. *See Kline v. Kaneko*, 685 F. Supp. 386, 389 (S.D.N.Y. 1988) ("The FSIA does apply to individual defendants when they are sued in their official capacity."); *American Bonded Warehouse Corp. v. Compagnie Nationale Air France*, 653 F. Supp. 861, 863 (N.D. Ill. 1987); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981).

statutory practice is the role of the State Department"[99] and that the Government's interpretation was inconsistent with Congress' manifest intent to remove the State Department's discretionary role in the process. Finding that the Act was meant to be comprehensive, the court concluded that the statute could not "reasonably be interpreted to leave intact the pre-1976 common law with respect to foreign officials", a proposition that would require courts to revert to the practice of giving conclusive weight to the State Department's determinations of whether or not a foreign government official's activities fall within the traditional exceptions to sovereign immunity.[100]

Addressing Chuidian's alternative theory—that in committing the alleged wrongs at issue Daza acted out of personal malice rather than in his official capacity—the Ninth Circuit made an observation, referred to by the parties here, that bears on the arguments in this case. The Court declared that "plainly Daza would not be entitled to sovereign immunity for acts not committed in his official capacity."[101] Nonetheless, the court concluded that, regardless of his motive, when Daza stopped the Bank's letter of credit payment to Chuidian, he was still purporting to act as a government official and exercising authority deriving entirely from his office as a member of the Presidential Commission.[102]

The *Chuidian* court's conclusion that the FSIA covers natural persons, but that sovereign immunity ceases when an individual state officer acts beyond the scope of his governmental authority, has been favorably cited or followed

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[99] *Chuidian*, 912 F.2d at 1102.

[100] *Id.* at 1102. The court noted that the *Restatement (Third) of Foreign Relations Law* §§ 451, *et seq.* (1986), which superseded the Second Restatement's scope of sovereign immunity the Government relied upon, entirely deleted the discussion of common law sovereign immunity and substituted a provision analyzing the relevant issues solely on the basis of the Act. *See id.* at 1103.

[101] *See id.* at 1106.

[102] *See id.*

in other cases.[103] The Ninth Circuit itself, in two related actions arising out of alleged acts of torture, executions and other human rights abuses allegedly committed by former Philippine President Ferdinand Marcos and his government ministers, ruled that the FSIA could not serve to provide sovereign immunity for such conduct when it is taken beyond the authority of any public mandate and thus could not have constituted acts of an agent or instrumentality of a foreign state within the meaning of the FSIA.[104] In a similar vein, in *Cabiri v. Assasie-Gyimah*,[105] a court in this District held that alleged acts of torture committed by a foreign state's Deputy Chief of National Security fell outside his governmental authority, and the protections of the FSIA therefore did not extend to immunize the individual's private conduct.

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[103] *See Byrd v. Corporacion Forestal y Industrial de Olanco S.A.*, 182 F.3d 380, 389 (5th Cir. 1999) (holding that two individual officers of a state governmental corporation doing business with parties in the United States qualified as state entities and that the FSIA accorded immunity for their official acts, despite accusations that their conduct was actuated by retaliatory motives); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (the son of a Crown Prince not entitled to FSIA immunity in connection with allegedly fraudulent agreement in furtherance of personal and private interests); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (finding no evidence that actions by the Deputy Governor of the foreign state's central bank were private or personal, but were taken only in his official capacity on behalf of the bank).

[104] *See Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467 (9th Cir. 1994); *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Litig.)*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

[105] 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996); *see also Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995); *cf. Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (noting that the Act of State doctrine does not apply to acts of a governmental official committed in violation of the nation's basic laws and unratified by its government).

b. *Aristede*

Against the foregoing string of authority, the Government here continues to press the sovereign immunity theory *Chuidian* effectively rejected. The Government dismisses *Chuidian* and its line of precedents as inapposite and distinguishable in two critical respects: none of these cases involved a sitting head-of-state or foreign minister, and in none of them did the State Department file a suggestion of immunity.[106] Thus, the Government argues that, contrary to *Chuidian*'s broad language and reasoning, courts uniformly have dismissed actions against heads-of-state where the Executive Branch did interpose a suggestion of immunity.

The Government relies upon *Aristede*[107] as its leading authority. There, plaintiff was the wife of Dr. Roger Lafontant, a political opponent who allegedly attempted a coup d'etat to prevent Haiti's then recently elected President Jean-Bertrand Aristede from assuming office. Aristede, according to plaintiff, ordered a member of Haiti's armed forces to execute Dr. Lafontant while in prison, an act plaintiff contended was a crime and a tort not officially sanctioned by or in furtherance of Aristede's official duties. Plaintiff brought suit during Aristede's exile in the United States. In that action, the Government, which had recognized Aristede as Haiti's lawfully elected head-of-state despite his overthrow, filed a suggestion of immunity asserting that " 'permitting this action

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[106] *See supra* notes 113-128 and accompanying text. The Government points out that in *Chuidian* what it filed was not a "Suggestion of Immunity" on behalf of the official, but what it characterized as a "Statement of Interest" in the case. *See* Gov't Reply, at 16; *see also Kadic*, 70 F.3d at 250 (where the State Department submitted a "Statement of Interest" disclaiming concern over the invocation of the political question doctrine to prevent adjudication of the underlying actions); *Lasidi*, (as reported by David A. Kaplan, *Reprieve for a Sheik*, Nat'l L.J., Oct. 10, 1983 at 2) (State Department filed a "Suggestion of Interest" indicating that it would be appropriate for the court to permit limited discovery in a suit concerning commercial interests involving the United Arab Emirates' head-of-state).

[107] *See* 844 F. Supp. 128.

to proceed against President Aristede would be incompatible with the United States' foreign policy interests.' "[108]

The court applied common law immunity principles to hold that, absent waiver by statute or by the relevant foreign government, Aristede, as Haiti's head-of-state recognized by the United States, was absolutely immune from the exercise of jurisdiction by United States courts. After examining the FSIA's legislative history, Judge Weinstein concluded that the statute was inapplicable to a recognized sitting head-of-state because the Act had not "modified the long standing rule of international and common law" relating to head-of-state immunity.[109] Instead, the court read the intent of the Act more narrowly to contemplate the specified exemptions from sovereign immunity to apply to state-owned entities engaged in commercial activities. The Court noted that "the FSIA took these cases out of the political arena of the State Department, while leaving traditional head-of-state and diplomatic immunities untouched."[110]

In sharp contrast with the broad language and implications of *Chuidian*, Judge Weinstein declared that "the State Department needs to retain decisive control of grants of head-of-state immunity by preserving the pre-FSIA 'absolute' theory of immunity" and concluded that "the pre-1976 suggestion of immunity procedure survives the FSIA with respect to heads-of-state."[111] Accordingly, because Aristede enjoyed absolute head-of-state immunity, it was not necessary for the court to consider whether an act of his allegedly ordering a killing would be regarded as official or private.[112]

The central principle of *Aristede*—that the enactment of the FSIA did not alter the role or binding effect of the State Department's suggestions of immunity for foreign

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[108] *Id.* at 131.

[109] *Id.* at 135.

[110] *Id.* at 137.

[111] *Id.*

[112] *Id.* at 139.

heads-of-state—in fact is consistently reflected in other post-FSIA cases where the Government filed suggestions of immunity. Especially on point in this regard is *Domingo v. Republic of the Philippines.*[113] There, plaintiffs alleged that the defendants, who included President Ferdinand Marcos and his wife Imelda, had planned, executed and covered up, during Marcos's rule, the murder of two senior Philippine political leaders who had opposed the Marcos regime.

Plaintiffs commenced their suit in 1981, while Marcos was still in power. In 1982, the court, in response to a suggestion of immunity filed by the State Department, ruled that the Marcoses were entitled to dismissal of the claims against them. At that time the court had found that the legislative history of the FSIA demonstrated "no evidence ... that Congress intended to eliminate the Suggestion of Immunity procedure as a means of securing the dismissal of an action against a foreign head of state"[114]. On this basis, the court concluded that it was bound to accede to the State Department's intercession on behalf of the Marcoses.[115]

In 1987, however, after the Marcoses fell from grace and left office for exile in the United States, plaintiffs moved to reinstate the earlier dismissed claims against them in the same action, which had proceeded against the remaining defendants. On this occasion, the court granted the motion, noting that neither the United States nor the government of the Philippines had interceded on the Marcoses' behalf to assert immunity and that whatever significance the State Department's suggestion possessed when it was filed in 1982 had expired by reason of the changed circumstances.[116]

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[113] 694 F. Supp. 782 (W.D. Wash. 1988).

[114] *Estate of Silme G. Domingo v. Marcos*, No. C82-1055V, slip. op. at 4 (W.D. Wash. July 14, 1983).

[115] *See Domingo*, 694 F. Supp. at 786.

[116] *See id.*

Also instructive is *First Am. Corp. v. Al-Nahyan.*[117] Plaintiffs in that case asserted claims naming various government officials and entities of the United Arab Emirates ("U.A.E."), including H.H. Sheikh Zayed ("Zayed"), the U.A.E.'s sitting head-of-state. The complaint alleged various fraudulent schemes and investments by defendants in connection with attempts to acquire certain banking interests in the United States. The Government filed a suggestion of immunity on behalf of Zayed. The court, rejecting arguments that the FSIA governed Zayed's assertion of immunity, ruled that claims against Zayed were barred because he was entitled to immunity from the court's jurisdiction under the head-of-state doctrine.[118] On this point, the court declared:

> the enactment of the FSIA was not intended to affect the power of the State Department . . . to assert immunity for heads of state or for diplomatic and consular personnel .... The United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and the courts of the United States are bound to accept such head of state determinations as conclusive.[119]

As regards the issue of the FSIA's application to individuals, the court observed that the Act's focus " 'is towards corporate and government entities—legal yet nonnatural "persons." Nowhere does the FSIA discuss the liability or role of natural persons, whether governmental officials or private citizens.' " [120] Significantly, the court held that certain defendants who were members of the ruling family of a political subdivision of the UAE, which thus was not a recognized independent state, were not entitled to head-of-state immunity because none was a sitting head-of-state and the State Department had not suggested

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[117] 948 F. Supp. 1107 (D.D.C. 1996).

[118] *See id.* at 1119.

[119] *Id.* (citing *Ex Parte Peru*, 318 U.S. at 588-89 and *Aristede*, 844 F. Supp. at 137).

[120] *Id.* at 1120 (quoting *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991)).

immunity on their behalf.[121] Similar reasoning and results are recorded in other cases involving State Department suggestions of immunity invoking the emerging head-of-state doctrine.[122]

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[121] *See id.* at 1121.

[122] *See, e.g., Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (dismissing a claim against King Fahd on the appearance by the United States to acknowledge that King Fahd was the recognized head of state of Saudi Arabia, which representation the court accepted as conclusive); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (claim naming British Prime Minister Margaret Thatcher in an action for damages arising out of the United States bombing raids in Lybia dismissed on the basis of the Government's suggestion of immunity for a sitting head of government), *aff'd in part, rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *Gerritsen v. de la Madrid*, No. CV-85-5020-PAR, slip. op. at 7-9 (C.D. Cal. Feb. 5, 1986) (in an action naming the President of Mexico and other Mexican officials in their individual and official capacities and alleging unlawful use of threat and force to prevent plaintiff from distributing leaflets in a public park in Mexico, the court accepted the State Department's suggestion of immunity on behalf of the Mexican President, noting that the FSIA "does not refer to individual representatives of foreign governments" and that its enactment "was not intended to affect the power of the State Department to assert immunity for diplomatic and consular personnel," which authority the court found extended to immunity for a head-of-state), *rev'd on other grounds as to other defendants*, 819 F.2d 1119 (9th Cir. 1989); *Kilroy v. Windsor*, No. C 78-291, slip. op. (N.D. Ohio Dec. 7, 1978); *see also Kline*, 685 F. Supp. at 392 (in an action alleging kidnapping and wrongful expulsion from Mexico and naming as a defendant the wife of the President of Mexico, the court observed that "it appears that defendant Cordero De La Madrid may be entitled to a dismissal under the Head of State doctrine", though the court did not rule on the question because it held that it lacked jurisdiction in other respects and remanded the case to the state court). On remand the state court deferred to the State Department's suggestion of immunity and dismissed as to Mrs. De La Madrid. *See Kline v. Kaneko*, 535 N.Y.S.2d 303 (Sup. Ct. N.Y. Co. 1988), *aff'd*, 546 N.Y.S.2d 506 (N.Y. App. Div. 1st Dep't 1989); *see also Guardian F. v. Archdiocese of San Antonio*, Case No. 93-CI-11345 (Tex. Dist. Ct. 1994) (suit against Pope John Paul II dismissed on Government's suggestion of immunity); *Kim v. Kim Yong Shik*, Civ. No. 12565 (Cir. Ct. 1st Cir. Hawaii 1963), *reported*

Equally germane is the courts' treatment of sovereign immunity in cases involving former or sitting heads-of-state where the State Department has decided not to intercede; where a waiver of immunity has been filed by the current foreign government; or where the United States does not recognize the legitimacy of the particular state or ruler.[123] In *Karadzic*, for example, the district court declined to exercise subject matter jurisdiction over claims alleging human rights violations brought against the self-declared head of the Bosnian-Serb entity, neither the state or ruler of which the United States had recognized. In considering Karadzic's claim of head-of-state immunity, the district court stated that "[w]ere the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction."[124]

On appeal, the Second Circuit, reversing the finding on subject matter jurisdiction, implicitly endorsed the district court's stated assumption and the reasoning in *Aristede* by positing that recognition of Karadzic as head-of-state by the Executive Branch in the future may confer immunity over the actions at issue.[125] For the purposes of the case at bar, what is especially relevant and instructive in these circumstances is the courts' implied assumption that, but for the immunity waiver or absence of the State Department's intercession, a head-of-state immunity might still present a viable defense.

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in 58 Am. J. Int'l L. 186 (1964) (in pre-FSIA case, the court extended immunity to a foreign minister, deferring to a State Department suggestion of immunity).

[123] *See, e.g., Doe v. Karadzic*, 866 F. Supp. 734, 737-38 (S.D.N.Y. 1994), *rev'd on other grounds, Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *see also In re Doe*, 860 F.2d at 43; *In re Grand Jury Proceedings*, 817 F.2d at 1110; *Noriega*, 746 F. Supp. at 1520; *Domingo*, 694 F. Supp. at 786; *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994).

[124] 866 F. Supp. at 738.

[125] *See Kadic*, 70 F.3d at 248 (citing *In re Doe*, 860 F.2d at 45, for the proposition that the scope of head-of-state immunity remains unsettled).

The Second Circuit intimated as much in *In re Doe*,[126] an action against former President Marcos of the Philippines and his wife alleging fraud and embezzlement of public funds. The Marcoses there asserted head-of-state immunity to resist subpoenas served on them. The Philippines government of Marcos's successor presented a diplomatic note to the State Department purporting to waive any residual immunity the Marcoses may have possessed under international and United States law.

On appeal from the district court's ruling accepting the waiver of immunity and holding the Marcoses in contempt for not complying with the subpoenas, the Second Circuit affirmed. The Court of Appeals observed that "because the FSIA makes no mention of heads-of-state their legal status remained uncertain."[127] It then added: "[w]hen lacking guidance from the executive branch, as here, a court is left to decide for itself whether a head-of-state is or is not entitled to immunity."[128]

c. Beyond *Chuidian* and *Aristede*

Taken as a whole, the import of the body of case law discussed above is that, whatever may be said in general concerning the effect and application of the FSIA to lower ranking individual foreign officials, whether sued in their governmental or private capacities, "the exact contours of head-of-state immunity . . . are still unsettled."[129]

Despite that part of the FSIA's legislative history prompted by the State Department's practices of filing suggestions of immunity pursuant to the Tate Letter and Congress' expressed

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[126] 860 F.2d at 45; *see also In re Grand Jury Proceedings*, 817 F.2d at 1111 (holding that head-of-state immunity is waivable at the behest of the sending state and accepting the Philippines government's waiver of whatever immunity Ferdinand and Imelda Marcos may have enjoyed).

[127] 860 F.2d at 45.

[128] *Id.*

[129] *In re Grand Jury Proceedings*, 817 F.2d at 1110.

intent to alter that process, the courts uniformly have continued to recognize an exception from application of the FSIA in cases dealing with actions brought against sitting heads-of-state on whose behalf the United States intercedes to confer immunity. This practice is regarded as a matter either not specifically addressed or explicitly precluded by the FSIA.

The emerging consensus points to a rule of law encompassing uniquely the scope of immunity of foreign heads-of-state from the jurisdiction of United States courts. It holds that in enacting the FSIA, Congress did not envision disturbing the traditional practice of the State Department, through filing its suggestions of immunity, conferring upon recognized heads-of-state absolute protection from the exercise of jurisdiction by courts in this country.[130]

Nonetheless, despite developing agreement on some aspects of the FSIA's effects on head-of-state immunity, several issues have surfaced which have yet to be conclusively resolved. Among the open questions are: (1) Who is entitled to assert head-of-state immunity? While the courts uniformly have accepted the claim as to heads-of-state and heads-of-government recognized by the United States, questions remain as to how far down the hierarchical chain the protection could legitimately extend.[131] (2) What are the

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[130] *See supra* note 122 and cases cited therein; *see also United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) ("Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases . . . only pursuant to the principles and procedures outlined in *The Schooner Exchange*, and its progeny. As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim."), *cert. denied*, 523 U.S. 1060 (1998).

[131] *See Republic of Philippines v. Marcos*, 665 F. Supp. 793, 797-98 (N.D. Cal. 1987) (rejecting a suggestion of immunity filed by the State Department on behalf of the Philippines Solicitor General, the court noted that the official was neither a sovereign or a foreign minister, "the two traditional bases for a recognition or grant of head-of-state immunity," and declared "[t]he government in this instance seeks to expand the head-of-state doctrine to encompass all

extent and circumstances under which head-of-state immunity may be waivable? [132] (3) To what degree are acts of individuals rather than governmental offices covered? [133] (4) Is there a distinction between private and governmental acts to which immunity may extend? [134] (5) Is there a difference in the degree of immunity conferred as between sitting and former heads-of-state? [135] (6) What is the exact weight to be accorded by the courts to the State Department's suggestions of immunity, and indeed whether, as the *Chuidian* court questioned, this role survived the FSIA at all? [136]

In light of these remaining uncertainties, this Court cannot conclude that resolution of the issues Plaintiffs present here is as clearly indicated as they contend. Absent more definitive

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government officials of a foreign state to whom the State Department chooses to extend immunity. There is no precedent for such a radical departure from past custom . . . ."); *see also El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 82 n.10 (D.D.C. 1999) (while dismissing on other grounds and not dispositively addressing defendants' claim of head-of-state immunity as embassy officials representing the President of the U.A.E., the court noted that the head-of-state doctrine "is limited only to the sitting official head-of-state . . . . The Court declines to expand the head-of-state immunity to cover all agents of the head-of-state.") (citations omitted), *aff'd in part, rev'd in part*, 216 F.3d 29 (D.C. Cir. 2000).

[132] *See In re Doe*, 860 F.2d at 45; *In re Grand Jury Proceedings*, 817 F.2d at 1110; *Aristede*, 844 F. Supp. at 134; *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993); *see also Hilao*, 25 F.3d at 1472 (declining to reach plaintiffs' contention that communications from the then current Philippines government purporting to waive Marcos's immunity, as well as Marcos's argument that there is no authority allowing one government official to waive the immunity of another official); *Chuidian*, 912 F.2d at 1103-05 (waiver by one governmental entity does not extend to another entity).

[133] *See Republic of Philippines*, 665 F. Supp. at 798-99; *Aristède*, 844 F. Supp. at 139.

[134] *See In re Doe*, 860 F.2d at 44-45; *Hilao*, 25 F.3d at 1470-71.

[135] *See In re Doe*, 860 F.2d at 45; *In re Grand Jury Proceedings*, 817 F.2d at 1110.

[136] *See supra* notes 97-99 and accompanying text.

guidance, this Court is persuaded that the more prudent course is one which does not presume that Congress squarely confronted these questions in drafting the FSIA and unequivocally had them all in mind at the time it adopted the statute, thereby indisputably resolving in the text of the Act the issues here in dispute. As already discussed, nothing in the legislative history indicates that Congress even implicitly considered these matters. Simply put, the head-of-state immunity issues described above were not yet "in the air" as part of the underlying concerns that prompted the FSIA nor in the debate and deliberations that accompanied the enactment.

Rather, the dominant thrust of the FSIA, as Congress declared in its legislative findings, and as manifest on its face, relates to "the claims of *foreign states* to immunity" from jurisdiction of United States Courts.[137] Congress' expression of statutory purpose, after noting that "[u]nder international law, *states* are not immune from the jurisdiction of foreign courts insofar as their *commercial activities* are concerned," further asserted that "[c]laims of foreign *states* to immunity should henceforth be decided by the courts of the United States . . . in conformity with the principles set forth in this chapter."[138]

The statute, as the Second Circuit has recognized, "makes no mention of heads-of-state."[139] Instead, it evinces a central concern with the adjudication of claims of sovereign immunity asserted in legal disputes arising from the commercial activities of states, their governmental agencies or public trading companies. The ordinary controversies that arose out of those claims were peculiarly susceptible to resolution by courts in accordance with familiar rules of law that offered the parties a greater measure of coherence, predictability and objectivity in an impartial forum, as well as a judicial process free from political and diplomatic pressures. This was an adjudicative process known to foreign states,

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[137] 28 U.S.C. § 1602 (emphasis added).

[138] *Id.* (emphasis added).

[139] *In re Doe*, 860 F.2d at 45.

consistent with international practices that had become prevalent. At the time the FSIA was enacted, most other nations had already adopted the restrictive theory of immunity to address precisely these considerations, as Congress itself acknowledged in expressing its intent to "conform to the practice in virtually every other country."[140]

While the "practice in virtually every other country" may have been uniform with regard to dealing with claims of immunity by states and their governmental entities in commercial disputes, it would be a dubious proposition to declare that uniform rules and practices that could be considered customary international law then existed with regard to sovereign immunity assertions made on behalf of heads-of-state. The record appears quite to the contrary.

Not only the uncertainty surrounding the basic head-of-state immunity issues—many of them still unsettled today, let alone in 1976—but the distinct diplomatic considerations and political consequences associated with the two forms of immunity also suggest the absence of prevailing standards that could have been the subject of considered and intended legislative codification in the Act.

Several elements establish the differences between sovereign immunity for states and their governmental entities as opposed to heads-of-state, and support a finding that, until otherwise definitively settled by Congress, the Executive Branch's role in determinations of head-of-state immunity was not affected by the passage of the FSIA. By reason of the traditional identity of the sovereign as both the state and its ruler, a residual political embodiment that still holds sway in some countries, individual and human dimensions enter into the mix in matters of sovereign immunity implicating recognized heads-of-state. Affronting the person and dignity of the leader of a sovereign nation, through an exercise of another state's territorial jurisdiction over the ruler, has a greater potential for fraying sensibilities than may be

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[140] H.R. Report, at 7.

associated with subjecting foreign state agencies or their officials to the power of the courts in commercial disputes. In the latter cases, states can more readily agree to the wisdom and applicable rules of engagement.

Moreover, some widely recognized judicial standards exist to guide adjudication of disputes involving state companies and their ordinary trading ventures. No such coherent and widely accepted rules exist as yet as regard heads-of-state. Thus, far greater likelihood exists for stirring embarrassment and offense to national pride and provoking acts of retaliation in connection with an exercise of jurisdiction extended individually to a nation's ruler by denial of sovereign immunity than by such action asserted against state commercial entities or even lesser foreign government officials. The potential for harm to diplomatic relations between the affected sovereign states is especially strong in cases, such as the one now before this Court, that essentially entail branding a foreign ruler with the ignominy of answering personal accusations of heinous crimes.

The significant distinction between the head-of-state and other governmental officials that justifies different sovereign immunity treatment was recognized and underscored in *The Schooner Exchange*. There Chief Justice Marshall in fact identified the "exemption of the person of the sovereign from arrest or detention within a foreign territory" [141] as an exception to the exercise of territorial jurisdiction in a category separate even from that pertaining to the immunity accorded to diplomatic ministers. [142] The Chief Justice acknowledged the unique personal sensibilities that attach to immunity for heads-of-state:

> A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The char-

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[141] 11 U.S. (7 Cranch) at 137.

[142] *See id.* at 138.

> acter to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it.[143]

Second, the reasons that prompted Chief Justice Marshall to classify immunity for the sovereign ruler in a category separate from that related to diplomatic envoys has another dimension. Unlike the sovereign nation itself, the head-of-state is not a static abstraction. The ruler travels. And when heads-of-state journey abroad on official business, they often engage in diplomatic activities and attend political and ceremonial functions, always uniquely attended by the emblems and trappings of office symbolizing the representation of their governments and sovereign states.

These foreign duties demand policies and practices—as an aspect of comity also fostering reciprocity—designed to safeguard that heads-of-state abroad be accorded the mutual respect and personal dignity to which their status entitles them.[144] That scope of protection would extend to heads-of-state a level of immunity from territorial jurisdiction at minimum commensurate with that accorded by treaties and widely accepted customary international law to diplomatic and consular officials,[145] although, for the reasons stated

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[143] *Id.* at 137-38.

[144] *See Satow's Guide*, at 9-10 ("It has been established for several centuries in customary international law that a sovereign, or head of state, who comes within the territory of another sovereign is entitled to wide privileges and to ceremonial honours appropriate to his position and dignity, and to full immunity from the criminal, civil and administrative jurisdiction of the state which he is visiting .... A head of state, whether a hereditary ruler or an elected president, does not enter the territory of another state in his official capacity without the clearest assurances being expressed or implied that full immunity and full ceremonial honours will be accorded.").

[145] *See id.* (noting that "[t]he personal status of a head of state of a foreign state therefore continues to be regulated by long-established rules of customary international law" which include immunity from criminal and civil jurisdiction; inviolability of his residence, person and movable property; exemption from taxes and searches of

above, an even greater degree of protection of heads-of-state would be warranted. As one court observed, it would be anomalous for states to confer upon their foreign envoys abroad diplomatic privileges and immunities extending farther than the immunity they recognize for heads-of-state.[146]

Third, while it may be only a modest extension under the FSIA definition of a foreign state to consider an individual official as an "agency" or "instrumentality", the fit is more awkwardly stretched as applied to head-of-state.[147] By tradition, an act of the nation's leader has more claim to be identified and associated as that of the "foreign state" itself, which the FSIA exempts from the exercise of the courts' jurisdiction.

Fourth, because the state and its ruler customarily have been so closely identified and intertwined, as regards a head-of-state it is far more difficult to draw the line distinguishing between conduct that is official and unofficial. The range of public activities directly involving heads-of-state is more encompassing and the demarcations of actions associated with them are more blurred than is the case as regards lesser officials and state agencies, the governmental functions of which are more discrete and better definable.

Fifth, issues as to who qualifies to be considered a head-of-state, under what circumstances, and how far and for how long the scope of immunity stretches, require more nuanced political and diplomatic judgments than those pertaining to the mandate of state entities or lesser officials. As *Noriega* and *Aristede* demonstrate, head-of-state immunity is an attribute of state sovereignty, not an individual right.[148]

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baggage and goods brought along; and similar protection for his spouse, family and possibly members of his official entourage).

[146] *See In re Grand Jury Proceedings*, 817 F.2d at 1111 (referring to the state's power to revoke immunity).

[147] *See Aristede*, 844 F. Supp. at 136 (noting that "[n]o case has . . . construed 'agency or instrumentality' to include a head-of-state").

[148] *See Aristede*, 844 F. Supp. at 132-33; *Noriega*, 746 F. Supp. at 1519; *see also In re Grand Jury Proceedings*, 817 F.2d at 1111.

The grant of immunity is also a matter of grace and comity entirely within the discretion of the Executive Branch.[149] Unlike the case of lower-ranking officials, head-of-state status requires a formal act of recognition by the Executive Branch, and only officials so recognized can claim entitlement to the corresponding privileges and immunities.[150]

Immunity judgments also tend to present especially delicate complexities by virtue of the need to differentiate in some circumstances between the state, the head-of-state and the head-of-government. Thus, the Government may choose to recognize a particular state, but not its declared head-of-state. Or it may recognize a state and head-of-state but not the nation's head-of-government. In other words, the act of political recognition of the head-of-state requires its own exercise of executive power, separate and apart from diplomatic recognition of the state, in accordance with the Executive Branch's assessment of the nation's various foreign relations interests.

Decisions, for instance, about which leader the country recognizes, or whether the head-of-state's immunity should be extended to a spouse or to a special envoy on a particular high-level mission on behalf of the head-of-state, if second guessed by the courts, could inevitably lead to foreign relations complications and invite reciprocal treatment. Those determinations are generally subject to their own intrinsically political and diplomatic considerations that could not readily lend themselves to coherent rules devised by the courts. Finally, after a head-of-state leaves office his former public status and corresponding privileges and immunities may require broader recognition and more complex waiver rules

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[149] *See Verlinden*, 461 U.S. at 486; *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

[150] *See Noriega*, 746 F. Supp. at 1520 n.14 ("[S]ince . . . head of state immunity is a privilege bestowed within the Executive's discretion, the government is not bound to a position it has taken on another foreign official in an entirely different context."); *see also Aristede*, 844 F. Supp. at 132-33.

than ordinarily may be necessary to attach to lower ranking state officials.

In sum, the several considerations attest that Congress could not have encompassed resolution of the open questions described above in the FSIA. While ordinarily Congress should be ascribed its due measure of prescience, the legislative record of the FSIA is too sparse to support a fair inference that Congress' intent reached as far as Plaintiffs here urge to address concerns that were largely unknown at the time. Matters of such moment and magnitude, as regards sensitive issues touching on foreign relations—no less so than as to constitutional questions—should not be grounded on what at best may be described as adumbrations of Congressional design divined from legislative silences, or emanating from the interstices or penumbras of the law. As the Second Circuit advised in *In re Doe*,

> in the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state .... If heads-of-state or former heads-of-state are to be immune for property allegedly taken in violation of international law, Congress should enact—or amend existing—legislation to make that clear.[151]

d. Plaintiffs' Authorities Distinguished

The cases and authorities Plaintiffs rely upon do not support a contrary reading of the FSIA's intent, at least as it pertains to the Act's application to immunity for heads-of-state. Plaintiffs' argument rests heavily on the line of cases, discussed above, which have held that the FSIA's definition of "foreign state" extends to individuals deemed to constitute state "agencies", "legal persons", "entities" or "instrumentalities."[152] While there is significant opinion supporting that interpretation, some courts addressing the exact question have

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[151] 860 F.2d at 45.

[152] *See supra* note 98 and accompanying text.

squarely ruled otherwise,[153] so that the proposition is by no means entirely settled.

Second, all of these cases have turned essentially on one central fact: the actions the foreign officials were carrying out which gave rise to the claims brought against them in court were found to fall within the scope of their official duties. To this extent the outcome in the cases is unremarkable and by no means surprising. That result is consistent, as the *Chuidian* court observed, with the general principle established in our domestic law that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly."[154] The doctrine recognizes that actions naming government officers as defendants for suits in their capacities as public agents are only alternative means of asserting a claim against the state itself and that typically plaintiffs in these cases contemplate that ultimately any recovery would come from the state treasury. On this basis, the rule distinguishes official-capacity suits from strictly personal claims.[155]

Starting from its predicated lack of practical difference between these two situations, the Ninth Circuit rejected an inference that, in passing the FSIA, Congress "intended to allow unrestricted suits against individual foreign officials acting in their official capacities."[156] In this regard, the court expressed concern that a contrary result would encourage litigants to evade the effects of the FSIA through artifice, pleading claims against individual officials rather than

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[153] *See First Am. Corp.*, 948 F. Supp. at 1120; *Herbage*, 747 F. Supp. at 66; *Republic of the Philippines*, 665 F. Supp. at 797.

[154] *Chuidian*, 912 F.2d at 1101 (citing *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

[155] *See Restatement (Second) of Foreign Relations Law* § 66(f) (recognizing that immunity extended to any state official or agent with respect to acts performed in an official capacity "if the effect of exercising jurisdiction would be to enforce a rule of law against the state").

[156] *Chuidian*, 912 F.2d at 1102.

directly against the foreign state itself, thereby effecting "a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly."[157]

Based on its stated premise, the court concluded that actions brought against government agents naming them individually, as well as the officials' assertions of sovereign immunity, must be assessed within the framework of the FSIA and the exemptions the Act delineates to the doctrine of immunity for states. It thus reflected the basis argued by the Government of the pre-FSIA common law deference under which the courts gave conclusive effect to assertions of immunity by the State Department on behalf of foreign officials.

On this point, the Ninth Circuit, again referring to the practical equivalence between suits against foreign states and suits against a state's officials acting within the scope of governmental functions, was troubled by the prospect of promoting "a peculiar variant of forum shopping"[158] in which some litigants would choose to sue the foreign officials, while others would file directly against the foreign states, depending on their assessment of the State Department's likelihood of interceding and its potential influence in one instance rather than another.

Whatever the merits of these considerations, neither the *Chuidian* court's analysis, nor that of the other cases which have followed it, had occasion to consider the unique circumstances associated with an action brought directly against a sitting head-of-state or foreign minister of a government recognized by the United States, whether the acts challenged are official or unofficial. Nor did they squarely confront the threshold issue, central to the dispute at hand, of the effect of a suggestion of immunity filed by the Department of State relating to an exercise of a court's jurisdiction over a recognized sitting head-of-state. In none of the cases

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157 *Id.*

158 *Id.*

grounding Plaintiffs' arguments did the State Department intercede with such a suggestion.[159]

In fact, only one instance, *Republic of the Philippines*,[160] has been reported in which a State Department suggestion of immunity was filed and not honored by a court. There, the action entailed not a head-of-state, but the foreign country's Solicitor General. That official, while traveling on government business in the United States, was served with a subpoena for a deposition and a request for production of documents. Insofar as the court declared that the FSIA entirely abrogated the Executive Branch's role in filing suggestions of sovereign immunity on behalf of foreign sovereigns, the statement runs counter to the greater weight of opinion which has held otherwise.

Moreover, the court also relied for its holding upon a determination that the FSIA does not apply to individual government officials, a construction of the statute that the Ninth Circuit abrogated in *Chuidian*. Thus, the case could have been decided, following the *Chuidian* reasoning, on the ground that an exercise of jurisdiction over the Solicitor General, as a representative of the government acting in his official capacity, was tantamount to an action brought against the state itself and thus entitled to immunity under the FSIA because it did not fall within any of the Act's exemptions.

By the same token, cases such as *Cabiri*[161], which hold that foreign government officials sued in their individual capacity for unofficial acts do not enjoy FSIA immunity, shed no more light on the precise issues here because they entailed neither sitting heads-of-state nor consideration of a suggestion of immunity filed by the State Department. To be sure, a

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[159] *See supra* note 91 for a discussion of the Goverment's "statement of interest" expressed in *Chuidian*.

[160] 665 F. Supp. at 797-98. While the Court rejected the claim of immunity under the head-of-state doctrine, it held that the official, present in the United States on a government mission, was entitled to diplomatic immunity.

[161] *See* 921 F. Supp. at 1197-98; *see also Hilao*, 25 F.3d at 1470.

plausible argument may be constructed that, in light of the concerns pertaining to the State Department's suggestion of immunity practices that prompted the adoption of the FSIA, there must be some limit on the circumstances and on the individual foreign officials on whose behalf the State Department may interpose the protection of the emerging head-of-state doctrine. A gray zone may exist in which conceivably the bounds of FSIA immunity for foreign states and assertions of head-of-state immunity may intersect, overlap or even collide.

A not so far-fetched set of facts may be conceived under which the State Department, subjected to foreign government diplomatic and political pressures of the kind that propelled the enactment of FSIA, would, under the banner of its application of common law head-of-state sovereign immunity, intervene to assert immunity on behalf of an individual foreign official who clearly is not a sitting head-of-state, nor acting on a foreign mission as special envoy or surrogate of the head-of-state, but is rather involved in his private or official capacity in a commercial dispute of the kind the FSIA explicitly contemplated to be excluded from claims of sovereign immunity. Such hypothetical circumstances are not inconceivable because, in fact, they are not far afield from some of the pertinent events that arose in *Chuidian* and *First Am. Corp.*[162]

Fundamentally, the dispute at issue in *Chuidian* centered on a commercial transaction involving a foreign state "agency or instrumentality", albeit represented by an individual acting in his official capacity—a fact that the State Department itself may have recognized when it characterized its intervention not as a suggestion of immunity but as a "statement of interest." Viewed in this light, the *Chuidian* outcome is unassailable and the Government's intervention there was somewhat flawed. Closer to home, the supposed situation may prevail in this case

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[162] *See Chuidian*, 912 F.2d at 1097, 1099; *First Am. Corp.*, 948 F. Supp. at 1121; *see also Lasidi*, *supra* note 72.

in relation to Plaintiffs' claims against the ZANU-PF, discussed further in Part III below.

Were the State Department to file a suggestion of immunity on behalf of foreign officials under these circumstances, arguably its action would prompt the kinds of concerns that impelled the FSIA and raise valid questions as to whether the assertion of immunity should be evaluated under the framework of the FSIA or of pre-FSIA doctrine as it applies to heads-of-state. The Second Circuit intimated as much in *In re Doe*, where it noted that "were we to reach the merits of the issue, we believe there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American Law."[163] For that reason, this Court believes that both *Chuidian* and *Aristede* may overstate their essential positions insofar as they purport to offer an overly categorical reading of the FSIA's effect on the State Department's role in the foreign immunity process and the weight the courts should accord the Department's declarations, at least as these pertain to recognized heads-of-state.

The matter now before this Court, however, as it relates to Mugabe and Mudenge, does not present the hypothetical overlapping zone posited above. Rather, it squarely implicates both an action brought individually and directly against a sitting foreign head-of-state and a foreign minister, and an invocation of the head-of-state doctrine through a formal Suggestion of Immunity filed on their behalf by the Department of State declaring that "permitting this action to proceed against the President and the Foreign Minister would be incompatible with the United States' foreign policy interests."[164]

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[163] 860 F.2d at 45 (citing *The Schooner Exchange*, 11 U.S. (7 Cranch) at 135 and *Republic of the Philippines v. Marcos*, 806 F.2d 344, 360 (2d Cir. 1986)) (emphasis added).

[164] Suggestion, at 2.

The Government's assertion of head-of-state immunity as to Mugabe extended to Mudenge, traveling as Foreign Minister and as a member of Mugabe's official entourage at the time he was served.[165] Accordingly, the Court concludes that, contrary to Plaintiffs' argument, the FSIA does not serve to abrogate the State Department's decisive role in the recognition of head-of-state immunity, nor to negate the head-of-state immunity invoked here by the State Department on behalf of Mugabe and Mudenge.

Inasmuch as the Court's honoring of the Executive Branch's Suggestion of Immunity is fully dispositive of the matter as it pertains to the Court's lack of personal jurisdiction over Mugabe and Mudenge, it is unnecessary for the Court to consider the merits of the substantive basis of Plaintiffs' claims of subject matter jurisdiction under the ATCA and the TVPA. It suffices to say, as the *Aristede* court concluded, that the TVPA does not negate head-of-state immunity,[166] and there are no defensible grounds for a different outcome as it relates to an action invoking the ATCA.

II. DIPLOMATIC IMMUNITY

The Suggestion asserts that in addition to head-of-state immunity, Mugabe and Mudenge, present in this country as representatives of the Government of Zimbabwe to the United Nations Millennium Summit at the time they were served, are also entitled to diplomatic immunity under the Convention on Privileges and Immunities of the United Nations[167] and the

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[165] *See Satow's Guide*, at 10; *see also Kim*, 58 Am. J. Int'l L. at 186.

[166] *See Aristede*, 844 F. Supp. at 138 (citing Sen. Comm. on the Judiciary, The Torture Victim Protection Act of 1991, S. Rep. No. 249, 102d Cong. 1st Sess. 7-8 (1991)) ("The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats . . . . Nor should visiting heads-of-state be subject to suits under the TVPA.").

[167] *Adopted* Feb. 13, 1946, *United States accession*, April 29, 1970, 21 U.S.T. 1418, 1 U.N.T.S. 16 (hereinafter the "U.N. Convention").

Vienna Convention on Diplomatic Relations.[168] Article IV, Section 11 of the U.N. Convention provides that temporary representatives of Member States to United Nations bodies and conferences accredited for those limited purposes are entitled to the privileges and immunities enjoyed by diplomatic envoys. Similarly, Article 31(1) of the Vienna Convention provides that diplomatic agents enjoy comprehensive immunity from civil jurisdiction.

Immunity extends to such temporary representatives throughout the course of their United Nations visit and applies from the time of entry into the United States until departure or expiration of a reasonable period following conclusion of their United Nations business.[169] The Government contends that pursuant to the Diplomatic Relations Act[170], an action against an individual who is entitled to immunity shall be dismissed where immunity is established "upon motion or suggestion by or on behalf of the individual."[171]

Plaintiffs counter that subsection 11(a) of the U.N. Convention confers a limited form of diplomatic immunity that does not apply to Mugabe and Mudenge in this case. Specifically, subsection 11(a) states that representatives of member states to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, "while exercising their functions and during their journey to and from the place of meeting," enjoy:

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[168] *Done* April 18, 1961, *United States accession*, December 13, 1972, 23 U.S.T. 3227, 500 U.N.T.S. 95 (hereinafter the "Vienna Convention").

[169] *See* Vienna Convention, Article 39(1) and (2).

[170] 22 U.S.C. § 254a, *et seq.*

[171] *Id.* at § 254d. The Court notes that under Article 10 of the Vienna Convention, the State Department may certify foreign diplomatic agents even after the official has entered the country and that under Article 39, the agents are entitled to immunity at the moment of notification to the appropriate authorities of the receiving state, even if they have already entered the territory. *See Republic of Philippines*, 665 F. Supp. at 799 (citing *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984)).

(a) immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind.[172]

According to Plaintiffs, this provision does not grant Mugabe and Mudenge the absolute immunity from civil jurisdiction asserted by the Government, but accords protection from suit only in respect to any conduct taken by them in their capacity as temporary representatives to the United Nations. Thus, because the offenses alleged here were not committed by Mugabe and Mudenge while engaged in that limited official role, subsection 11(a) of the U.N. Convention would not immunize their personal conduct.

The Government, however, replies that subsection 11(g) of the U.N. Convention also applies here to support its diplomatic immunity theory. That provision, following the enumeration that precedes it under the heading of Section 11, states that the temporary officials covered shall receive "such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy." In the Government's reading, it is not incompatible with subsection 11(a) to grant the immunities subsection 11(g) provides, so long as such additional immunities are not expressly excluded by Section 11.

But Plaintiffs read subsection 11(g)'s "not inconsistent" reference as a limitation to the scope of Section 11 as a whole. In Plaintiffs' view, those qualifying words would contradict subsection 11(a) if interpreted to grant absolute immunity for all conduct, though subsection 11(a) confers immunity only for words spoken or written or other acts taken by officials in the course of discharging their duties as temporary representatives to the United Nations. In other words, on this theory only things said and done arising from the particular event temporary delegates are attending would be protected. So

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[172] U.N. Convention, § 11(a).

construed, the broader immunity enjoyed by accredited diplomats and principal resident representatives to the United Nations encompassing other times, places and subjects would not extend to the temporary envoys covered by Section 11.

The Court is not persuaded by Plaintiffs' interpretation of Section 11. That reading too narrowly constricts the immunity contemplated by the U.N. Convention to ensure the freedom and independence temporary delegates require to fulfill their responsibilities effectively. Specifying that immunity from legal process applies to words spoken or written and acts performed by temporary representatives in an official capacity underscores that at least those actions are protected by immunity. In fact, Section 12 of the U.N. Convention highlights the significance of this immunity by specifying that it continues to be enjoyed by the covered temporary envoys even after they cease serving in their capacities as delegates. Though, if read technically and in isolation, the language of subsection 11(a) could suggest that immunity as regards all other acts of temporary delegates would be precluded, such an exclusion could not have been contemplated in light of the enlargements of immunity evident elsewhere in the U.N. Convention.

First, that interpretation would create an internal textual conflict between the captional language of Section 11 that refers to "while exercising their functions" and the limitation Plaintiffs read into the "capacity as representatives" provision of subsection 11(a). It is clear that the "while exercising their functions" clause in the heading could encompass a broader range of activities than those of the official capacity language of the subsection. In discharging their narrowly defined official duties as delegates to a given event, temporary representatives to United Nations organs and conferences generally attend meetings and make speeches. But they also may be designated by their governments to perform related functions that may extend beyond the strict confines of the particular gathering.

In practice, ancillary to their narrower duties, temporary envoys may be assigned to represent their governments at

other diplomatic, ceremonial and goodwill missions and bilateral conferences that typically occur at the margins of United Nations events and contribute to their success. Exercising duties associated with such attendant activities may be encompassed by the broader band of the "functions" referred to by the language at the head of Section 11 and covered by immunity under subsection 11(g), even if the acts in question may not arise from within the narrow corners of the delegates' capacities strictly connected with attending meetings of a specified United Nations body or conference encompassed by subsection 11(a).

Moreover, the language in the heading of Section 11 also specifies that the special representatives enjoy immunity "during their journey to and from the place of meeting".[173] At such times, for example, upon arrival in or departure from the United States, the delegates presumably would not yet be performing any acts in their capacities as representatives as contemplated by subsection 11(a), though they nonetheless would be entitled to the specified immunity during that period of travel. On Plaintiffs' reading of subsection 11(a), temporary envoys theoretically would be subject to domestic civil jurisdiction in connection with any matter unrelated to their official duties at the moment they set foot in the host country and before they have had any opportunity to exercise any functions as delegates.

Second, the narrower interpretation of Section 11 would create anomalies and absurd results. United Nations ambassadors accompanying their heads-of-state or foreign ministers to a function would enjoy broader immunities than accorded to their superior officers, even though in reality the latter as temporary representatives may be charged with larger duties related to the United Nations event at issue, and though, theoretically, under the customary rules governing immunity, as heads-of-state and foreign ministers, some of them would

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[173] U.N. Convention, § 11.

be entitled to broader exemption from territorial jurisdiction.[174]

Moreover, reading subsection 11(a) to authorize service of process upon temporary representatives at any moment they are not engaged in acts strictly connected with the representatives' limited capacity as conference delegates, or at any place they take a step beyond the borders of the designated United Nations district, would encourage litigants and their process-servers to pursue the delegates and lie in wait to seize upon the first departure from the narrow protocol, thereby potentially discouraging the designation of particular temporary envoys and defeating the purposes of Section 11.

The net effect of Plaintiffs' construction of Section 11 would be to equate the privileges and immunities enjoyed by temporary delegates of United Nations member states with those accorded to invitees of the United Nations. The latter, who may include private persons as well as government officials, travel to the United Nations at the invitation of the organization and not as representatives of the member states or necessarily in their public capacities. The privileges and immunities accorded to invitees are narrower than those enjoyed by permanent and temporary United Nations envoys who represent the states, and are separately set forth in the Headquarters Agreement. Section 9(a) of the Headquarters Agreement limits the invitees' protection from service of process strictly to the confines of the United Nations district.[175]

The Court finds that the broader reading of Section 11 better comports not only with the text, but, as the Government points out, with the history of the U.N. Convention's adoption by the United States. Because the language of the treaty is not as

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[174] *Satow's Guide*, at 9-10; *see Restatement (Third) of Foreign Relations Law* § 464, Reporter's Note 14.

[175] *See* 22 U.S.C.A. § 287 Note; *Kadic*, 70 F.3d at 247; *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 54 (2d Cir. 1991).

unambiguous as Plaintiffs contend,[176] consideration of the legislative record is appropriate.[177] The report accompanying the Senate's advice and consent to ratification of the U.N. Convention makes clear that in adopting the treaty the United States understood it was extending the privileges and immunities enjoyed by temporary representatives of Member States to the level of protection conferred upon accredited diplomats.[178]

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[176] *See* Yu-Long Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 Wash. & Lee L. Rev. 91, 112 (1976) (hereinafter "Ling") (noting that members of one of the United Nations standing committees had expressed concern that subsection 11(g) of the U.N. Convention appeared ambiguous).

[177] *See Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989) (in statutory construction the courts are "not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"); *see also Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) ("the meaning of words depends on their context").

[178] *See* Report of the Committee on Foreign Relations, Exec. Rept. 91-17, 91st Cong. (March 17, 1970) (hereinafter "Exec. Rept."). This understanding was expressly conveyed by the State Department Legal Adviser, John R. Stevenson, at hearings before the Foreign Relations Committee on March 9, 1970. Describing the effect the Convention would have on privileges and immunities for nonresident representatives, the official stated:

> At the present time resident representatives are already granted full diplomatic privileges and immunities under the headquarters agreement. Nonresident representatives, on the other hand, are only covered by the International Organizations Immunities Act and that grants them immunities relating to acts performed by them in their official capacity.
>
> Under the convention, the nonresident representatives would also receive full diplomatic privileges and immunities.
>
> The Chairman [Senator Fulbright]: They are the principal beneficiaries; is that right?
>
> Mr. Stevenson: They are in terms of numbers the principal beneficiaries. There are about 1,000 of them who would be covered who are not now.

The Executive Branch's view that the U.N. Convention broadened immunities for temporary envoys to the United Nations so as to make them coextensive with those of resident representatives and accredited diplomats was unambiguously expressed by the Senate Committee:

> With regard to representatives of members, currently only resident representatives of permanent missions to the U.N. have full diplomatic immunities. Nonresident representatives enjoy only functional immunities; that is, immunities with respect to their official acts. *Under the convention, these nonresident representatives will also be entitled to full diplomatic immunities. The group covered here consists of foreign officials coming to the United Nations for a short time to attend specific meetings—such as the annual fall meetings of the General Assembly. Foreign ministers and other high government officials, distinguished parliamentarians, and representatives of that caliber, fall into this category,* which is estimated to number about 1,000 persons a year.[179]

Heads-of-state and foreign ministers are precisely the types of officials who visit the United Nations for temporary purposes to attend conferences and special activities and who are contemplated by this language as being afforded "full diplomatic immunities" under the Convention. In fact, the customary diplomatic practices of heads-of-state and foreign ministers also illustrate the point that in "exercising their functions" as contemplated by Section 11, they rarely confine their roles as temporary representatives solely to the narrower capacities of the particular conference. Rather, they typically engage in a wide range of associated diplomatic missions and

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> As Ambassador Yost [then the U.S. Permanent Representative to the United Nations] pointed out, many of the nonresident representatives are distinguished parliamentarians who come to New York for very short periods of time and we believe should be treated with the same respect as permanent representatives.

Id. at 11-12.

[179] *Id.* at 3 (emphasis added).

ceremonial events that the opportunity affords, activities that substantially foster and enhance the purposes of the underlying United Nations conference or session.[180] Here, Mugabe and Mudenge, at the time they were served, were engaged in exactly the type of visit "for a short time to attend specific meetings"[181] at the United Nations that the United States intended to render absolutely immunized.[182]

This legislative record conveys unequivocally that both the Executive Branch and the Senate intended that Section 11 of the U.N. Convention would confer full diplomatic immunity to temporary representatives to the United Nations. This understanding also accords with the reading and application of Section 11 by officials of the United Nations. The United Nations Secretary-General, as reflected in opinions of the organization's Legal Counsel, adopts a "broad" interpretation of Section 11's phrase "while exercising their functions" that is consistent with this Court's reading of the text and that effectively rejects the narrow view Plaintiffs espouse.[183] In one opinion, for example, the Legal Counsel advised that "[i]n the view of the Secretary-General, to interpret those words so as to limit them to the times when the person concerned is actually doing something as part of his functions as a representative, for example, speaking in a United Nations meeting, leads to absurd and meaningless results making such an interpretation untenable."[184] The opinion concluded that,

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[180] *See generally*, *Satow's Guide*, at 312-13.

[181] Exec. Rept., at 3.

[182] In fact, then-Ambassador Yost had underscored this point in addressing the Senate Foreign Relations Committee:

> I have long feared that a visiting dignitary to the United Nations might some day be involved in difficulties not of his own making and that the U.S. Government would be powerless to accord him the privileges which would be appropriate and which would be expected of us. Our ratification is long overdue.

Id. at 11.

[183] *See 1976 U.N. Juridical Yearbook*, at 228.

[184] *Id.*

"taken as a whole, Section 11 of the Convention in fact confers, except for the exemptions [regarding payment of customs and taxes] just mentioned, diplomatic privileges and immunities on the representatives of Members."[185]

Because the United Nations and its Member States operate on a global scale, it is essential that the U.N. Convention is given uniform interpretation and application in all countries where it is in effect. For this reason alone, courts should defer to the interpretation of the U.N. Convention adopted by the United Nations and evinced by the United States Congress when it ratified the Convention. As the Supreme Court has declared,[186] "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation." This Court has found no extraordinarily strong evidence here suggesting that the interpretation of Section 11 the United States advances is not entitled to deference. Accordingly, the Court concludes that both Mugabe and Mudenge enjoyed diplomatic immunity at the time they were served and that the Court therefore lacks a basis for exercise of jurisdiction over them.

III. PERSONAL INVIOLABILITY

Plaintiffs contend that even if head-of-state or diplomatic immunity shielded Mugabe and Mudenge from the Court's jurisdiction, such protection does not extend to ZANU-PF and that a default judgment should be entered in this action against

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[185] *Id.* at 227.

[186] *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982); *accord*, *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("[T]he meaning given [treaty provisions] by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *767 Third Avenue Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 301-02 (2d Cir. 1993) ("federal courts must defer" to treaty interpretation advanced by United States and not contradicted by any signatory to the treaty).

that political entity because the organization was properly served with process through the personal service effectuated on Mugabe and Mudenge in their capacities as senior officers of the party. On Plaintiffs' theory, because the U.N. Convention immunizes foreign officials from service only for suits based on official acts associated with their United Nations visit, and not from unrelated private actions such as those involving ZANU-PF, personal inviolability would not apply to preclude service of process on Mugabe and Mudenge. The Government responds that both head-of-state and diplomatic immunity render Mugabe and Mudenge absolutely inviolable for all purposes, so that service of process on them, even that intended for ZANU-PF, was a nullity and should be quashed.

Indisputably, personal inviolability goes to the core of diplomatic immunity. Inviolability is a venerable principle, its essence and enduring roots articulated by a leading treatise:

> Personal inviolability is of all the privileges and immunities of missions and diplomats the oldest established and the most universally recognized .... The inviolability of ambassadors is clearly established in the earliest European writings on diplomatic law and from the sixteenth century until the present one can find virtually no instances where a breach of a diplomat's inviolability was authorised or condoned by the Government which received him.[187]

When Congress enacted the Diplomatic Relations Act[188] to implement the Vienna Convention, it established the applicable law on the subject in the United States. The Vienna Convention provides full personal diplomatic inviolability, stating simply that "[t]he person of a diplomatic agent shall be inviolable."[189] The principle of personal inviolability extends

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[187] *Satow's Guide*, at 120; *see also* Sen, *A Diplomat's Handbook of International Law and Practice* 107 (3d ed. 1988) (hereinafter "*Diplomat's Handbook*").

[188] 22 U.S.C. § 254a *et seq.*

[189] Vienna Convention, Article 29.

its privileges and immunities to visiting heads-of-state as an aspect of head-of-state immunity.[190]

The Government seeks to expand upon these settled principles. It argues that the scope of inviolability to which foreign officials are entitled effectively confers absolute immunity, not only from exposure to litigation and legal compulsion, but from all service of process. The Government further maintains that the service of process is an assertion of jurisdiction and is thus precluded as to persons who enjoy immunity from the Court's jurisdiction because if personal jurisdiction is lacking, then service of process is void.[191] Moreover, the Government asserts that "the State Department considers that personal inviolability under Article 29 of the Vienna Convention precludes the service of compulsory legal process on diplomatic agents."[192] Consequently, while the State Department's Suggestion of Immunity does not purport to assert immunity on behalf of ZANU-PF, and the Government has not maintained in this proceeding that ZANU-PF is entitled to invoke any form of immunity from the exercise of the Court's jurisdiction, the Government's inviolability theory effectively would achieve the same result by indirectly shielding ZANU-PF, under the cover of Mugabe's head-of-state immunity, from the reach of territorial jurisdiction.

These respective arguments raise a threshold issue: the meaning and scope of the concept of diplomatic inviolability. The Vienna Convention articulates the standard in this regard. It provides that

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[190] *See Restatement (Third) of Foreign Relations Law* § 464, Reporters' Note 14 ("When a head of state or government comes on an official visit to another country, he is generally given the same personal inviolability and immunities as ... an accredited diplomat."); *Satow's Guide*, at 9.

[191] *See Aidi v. Yaron*, 672 F. Supp. 516, 517 (D.D.C. 1987); *see also Aristede*, 844 F. Supp. at 130.

[192] Gov't Reply, at 34.

> [t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.[193]

The principle is rooted in the traditional concept that diplomats, serving in a foreign and potentially hostile land as surrogates of their sovereign, required appropriate protections, and that any attack on or offense to them similarly constituted an affront to the ruler they represented.[194] Inviolability of the diplomat's person therefore became essential "in order to allow him to perform his functions without any hindrance from the government of the receiving state, its officials and even private persons."[195]

The limited case law addressing the concept of inviolability generally involves actions that entail detention; searches of the person, baggage or premises; subpoenas to provide evidence at legal proceedings; and civil or criminal actions brought directly against diplomats who then assert immunity.[196] Neither Plaintiffs nor the Government has produced any precedent addressing the precise issue presented here: whether inviolability would extend to preclude service of process on foreign officials entitled to head-of-state or diplomatic immunity when service is effected on them for purposes not involving an assertion of personal jurisdiction against such officials, but is directed against an affiliated non-governmental third person or entity on whose behalf they may be served. The Court's own research has uncovered no case exactly on point or sufficiently analogous as regards either head-of-state or diplomatic immunity. Nonetheless, the Government, without citing any authority or even pre-FSIA practices, asserts that inviolability works to bar even such

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[193] Vienna Convention, art. 29.

[194] *See Diplomat's Handbook*, at 107.

[195] *Id.*; *see also Satow's Guide*, at 120-21.

[196] *See generally* Ling, 33 Wash. & Lee L. Rev. at 104-31.

purported exercises of jurisdiction. On this point, the Court parts company with the Government's view.

Whatever may be the remnants of post-FSIA common law foreign immunity as to heads-of-state, the Court is not persuaded that the doctrine reaches to the outer bounds the Government advances as regards Plaintiffs' action against ZANU-PF. From the analysis of sovereign immunity detailed above, it is clear that insofar as head-of-state immunity branched into a distinct doctrine since the enactment of the FSIA, whatever judicial support exists for the proposition that some stem of common law immunity survived the FSIA, that exception applies only to protect a recognized sitting head-of-state from suit and potential liability. The judicial deference accorded to State Department suggestions of immunity extends to honor the Executive Branch's determinations concerning which particular foreign ruler is a recognized head-of-state and what acts of his are strictly governmental and thereby entitle the official to claim personal immunity from territorial jurisdiction. Nothing in the evolution of the common law doctrine suggests that the exception also encompassed conferring upon the State Department the function of defining the full reach of the concept of inviolability as it pertains to heads-of-state.

Indeed, as discussed above, just how far beyond the original predicate the scope of head-of-state immunity may be carried, given the numerous uncertainties and the formative state of the doctrine, is subject to doubt and debate. Substantial questions remain unsettled, for example, concerning precisely which foreign officials may invoke the immunity; whether the doctrine applies solely to the head-of-state or government; or whether it may be enlarged to protect other persons or entities.[197] Similarly, as the Second, Fourth and Ninth Circuits have intimated, head-of-state immunity from suit may not necessarily equate under all circumstances to immunity

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[197] *See supra* Part I.B.4.c.

from offering testimony at a deposition or trial.[198] These open issues represent interstices in the law that must be filled by reasoned judicial interpretation in the light of experience and by sound application of the emerging common law, rather than by reflexive expansion of the Executive Branch's categorical reading of a limited doctrinal exception. In view of the flux and uncertainties surrounding the matters in question, and absent more settled law on point, this Court is not persuaded that the principle of personal inviolability would encompass the lengths to which the Government's assertion in the matter at hand would enlarge it.

While the Government here and in other cases has offered valid grounds for the courts to honor the State Department's suggestions of immunity and defer from exercising jurisdiction over a recognized sitting head-of-state that would subject the foreign official to be hauled into court and potentially be exposed to personal liability, the Court finds uncompelling the further contention that the doctrine requires courts to give conclusive effect to the State Department's advice with regard to the appropriateness of service of process upon a head-of-state as it arises in this case. Several considerations weigh against such a proposition.

First, the head-of-state doctrine as a residual branch of common law sovereign immunity addresses the personal immunity of the ruler. Nothing in the history of the principle suggests that it also worked indirectly to extend derivative immunity to private entities or non-governmental ventures with which the head-of-state may be associated. Thus, though under the common law rules the Court may be bound to accord

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[198] *See In re Doe*, 860 F.2d at 44-45; *In re Grand Jury Proceedings*, 817 F.2d at 1111 ("The issue in this case, however, is not whether the Marcos' may be civilly liable, but whether they are wholly immune from process."); *Estate of Domingo*, 808 F.2d at 1350; *see also Lasidi*, Nat'l L.J., Aug. 29, 1983 at 1, col. 1 (conditioning assertion by a head-of-state of a counterclaim in a dispute involving the ruler's private financial investments upon his agreement to submit to a deposition).

conclusive effect to a suggestion of immunity filed on behalf of a recognized head-of-state to avert an exercise of personal jurisdiction over the sovereign, it is not similarly obliged to honor an assertion of immunity whose intended beneficiary, expressly or impliedly, is a private third person or organization not associated with the head-of-state in any governmental or familial connection, when the practical effect of the immunity claim is to cloak such a party from domestic civil jurisdiction.

Second, it is incontestable that arrest, detention, searches, taxation or any form of legal compulsion asserted directly against a foreign state leader or diplomat not only serve to create hindrances to the performance of the foreign official's functions, but constitute affronts to both the person and dignity of the ruler and to the sending foreign state. These practices also run counter to comity and invite reciprocal measures harmful to harmonious relations among nations. While these concerns provide the justification for the principle of inviolability, they do not arise to the same extent in connection with the service of process upon a foreign state official intended to effectuate jurisdiction concerning matters and parties collateral to the head-of-state's or diplomat's official status. Service of process under these circumstances would not demand the official's appearance in court nor subject him in other ways to the court's compulsory powers in a manner that could be deemed an assertion of territorial authority over the foreign dignitaries and, by extension, over the foreign state they represent. Grounds to give affront to the person or dignity of the foreign official, or to interfere with the officer's governmental functions, do not arise in this context, or may do so only minimally or to a degree substantially outweighed by other interests of justice.

In this case, for example, it is ZANU-PF institutionally, rather than Mugabe or Mudenge personally, to which the exercise of the Court's jurisdiction applies; it is ZANU-PF, not Mugabe or Mudenge, which is called to answer to the notice of process served upon Mugabe and Mudenge as senior officers of ZANU-PF. In this regard, it is pertinent that the

process served on Mugabe and Mudenge did not relate to a matter or third party with which they were unconnected. Rather, the complaint identifies Mugabe as First Secretary and President of ZANU-PF and Mudenge as a senior officer of the party. Service on them was designed to reach an unofficial organization whose political function they were attending and whose purpose, according to Plaintiffs' uncontested assertions, was to raise funds for ZANU-PF in this country, to elicit political support for Mugabe's regime and to blunt domestic attacks on his policies. Given this context, it would not be unexpected that such integral ties to and use of private entities by foreign state officials could supply grounds to justify, if not the exercise of personal jurisdiction over them, at least the service of process intended to challenge wrongful actions of the particular organization with which they are closely associated and whose bidding they were doing at the time of service.

Second, under practices pursuant to both the Tate Letter policy and the FSIA, the immunity recognized for foreign states did not conclusively eliminate service of process upon individual representatives of their governments, even if they otherwise happen to enjoy diplomatic immunity in connection with their own actions, as regard the matters the Act specifically exempted from foreign state immunity. Pursuant to § 1608(b)(2) of the FSIA, if suit is brought against an agency or instrumentality of a foreign state, service may be effected "by delivery of a copy of the summons and complaint whether to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States."[199] Nothing in the

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[199] 28 U.S.C. § 1608(b)(2); *see also Bowers ex rel. NYSA-ILA Pension Trust Fund v. Transportes Navieros Ecuadorianos (Transnave)*, 719 F. Supp. 166, 170 (S.D.N.Y. 1989) (service properly effected on defendant's agent in the United States pursuant to § 1608(b)). In addition, service of process pursuant to other statutory regimes clearly permit service in some circumstances upon foreign officials who may enjoy some form of immunity. Section 311(a) of the New York Civil Practice Law and Rules,

statute would bar service in an action properly arising under the Act to be made on an officer or general agent of the foreign state who also happens to be a state official or diplomat otherwise entitled to immunity—theoretically including even a head-of-state who satisfies the statutory criteria defining the persons upon whom service is authorized to be made.[200] Thus, the procedural provisions of the FSIA seem to contemplate and legitimize the point that the doctrine of inviolability does not serve as an absolute barrier to the service of process in certain limited circumstances.

In applying the evolving doctrine of common law head-of-state immunity, this Court is mindful of another concern. Vigilance is essential to ensure that the type of misuse of sovereign state immunity that impelled the enactment of the FSIA does not tiptoe into the application of head-of-state doctrine. Just as states once employed corporate forms, shielded by sovereign immunity to engage in essentially private enterprise, heads-of-state should not assert the emerging doctrine, that immunizes them personally from the exercise of territorial jurisdiction, to extend their protection from liability, under the mantle of inviolability, to non-state individuals and entities used as agents and conduits to execute private wrongful actions.

Third, other principles and practices of international law confirm that the concept of inviolability is not absolute; widely recognized exceptions to it do exist. As Chief Justice Marshall acknowledged in *The Schooner Exchange*, circumstances do arise where, for instance, by acquiring

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paralleling FSIA § 1608(b)(2), contemplates personal service upon a foreign corporation by direct delivery to an officer, director or general agent.

[200] *See Klinghoffer*, 937 F.2d at 54 (noting that service of process upon the Palestine Liberation Organization's Permanent Observer to the United Nations may be appropriate, as that official, though otherwise entitled to limited immunity at the United Nations, also performed functions comparable to those of a general agent for purposes of service of process under federal procedure).

property in a foreign country, a head-of-state could be considered to have subjected that property to territorial jurisdiction and himself to that limited degree to have assumed the character of a private individual.[201] Reflecting this principle, well-settled practices of customary international law hold that inviolability would not apply to bar civil jurisdiction over foreign rulers or diplomats in actions involving their real property abroad, or their private services as executors of an estate, or other unofficial professional or commercial activities.[202] Recognition of these exceptions presupposes that to obtain personal jurisdiction over the head-of-state or diplomat in connection with the particular actions, they would have to be amenable to service of process. Consequently, to this extent the doctrine of inviolability would not preclude service of process upon a foreign head-of-state or diplomat. Failure to validate process in these situations would defeat the purposes of the noted exceptions.

Implicitly conveyed by the exceptions is that service of process per se does not offend the concept of personal inviolability. Rather, in the limited context described, process is permitted because it does not implicate the concerns over comity and affront to the person or dignity of the head-of-state or diplomat even under circumstances where the exercise of jurisdiction over the person, and conceivably the presence of the official in court or the court's compulsion over the person, may be demanded. The exceptions also reflect a recognition that in these limited circumstances the foreign rulers or diplomats, by engaging in certain private activities in the foreign state, could be deemed to have understood, and in some measure impliedly or expressly accepted, the piercing of their shield of inviolability. In a similar vein, by engaging in non-governmental activities abroad on behalf of private entities or enterprises with which they may be closely affiliated, foreign officials otherwise entitled to immunity

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[201] *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 145.

[202] *See* Vienna Convention, Article 31; *Satow's Guide*, at 10; *Diplomat's Handbook*, at 118.

could be considered to have subjected themselves to the service of process intended for the entity or enterprise at issue, even if the officials themselves continue to enjoy immunity as to their own persons.

This proposition, in fact, parallels the development of exemption of foreign states from sovereign immunity in connection with activities that are strictly commercial as opposed to governmental. The exception, though recognizing immunity for the state itself, precludes the state's functionally private entities from invoking sovereign immunity to escape liability for wrongs arising from their commercial transactions. If under current practice a foreign head-of-state or diplomat may, consistent with personal inviolability, become personally and fully subject to the civil jurisdiction of another sovereign in some situations, it would not offend the principle to permit service of process upon such an official in a context that is narrower and less intrusive—that is, one in which service is intended for a private entity or enterprise with which the official is closely associated, where no hindrance to the official's exercise of governmental or diplomatic functions otherwise results.

In sum, however ancient and royal the pedigree of the inviolability doctrine may be, this Court finds no basis to conclude that the rule extends to confer absolute immunity from service of process where a head-of-state or diplomat would not be subjected personally to a foreign court's jurisdiction nor exposed to liability in that court. Modern realities have done much to demystify the figure of the head-of-state and to lay bare some of the ancient myths about the emperor's garb that cloaked the sovereign's conduct in divine fictions and absolutes.

In modern times, through the world-wide spread of democracy and its leveling concepts of equality, we have come to realize that rulers of states are human after all, subject to all human drives, predilections and foibles. They have private lives, in the course of which on occasion they stray from expected norms and are capable of abusing power and betraying their public trust. And when sovereigns assume

human form and come down to earth, as did the gods of myths and kings of old, they do mundane things—the kinds of things ordinary mortals routinely do. They engage in political affairs. They enter personal relationships. In pursuit of private gains, they undertake financial transactions and commercial ventures. In doing so, they may act personally or indirectly, as individuals or through surrogate entities or enterprises, by either means sometimes transcending public ends, their transgressions causing wrongs to people they encounter along the way.

In this manner, leaders of nations evince that personal dignity is a two-faced thing. The public face whose appearance the law goes to great lengths to protect against affronts is sometimes sullied and diminished by the leader's own hand through dark deeds that soil the private face. For these reasons, there is growing acceptance for a rule of law that reaffirms that no person is above the law. And it should come as no surprise to heads-of-state and other high-ranking public officials that in some way at some point even they may be called upon to play a role in the public's quest for accountability for their privately inflicted harms. To this greater good, acceptance of process on behalf of their surrogate entities or agents is the minimum contribution that heads-of-state can make in advancing the interests of larger justice. In this way, an overarching end may be achieved at negligible sacrifice of the leader's public dignity perhaps already stained, and without hindrance to the performance of governmental roles.

This practice accords with principles recognized in this country. Under similar circumstances, the Supreme Court has carved considerable substance from the old categorical immunity barriers. It established in *United States v. Nixon*[203] that even a sitting President may not assert immunity from a criminal subpoena, and in *Clinton v. Jones*[204] that official

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[203] *See* 418 U.S. 683 (1974).

[204] *See* 520 U.S. 681 (1997).

immunity would not bar a private civil lawsuit from proceeding against a President still in office. Globally, the inroads made by the community of nations in defining, asserting jurisdiction and prosecuting heads-of-state and other high-ranking government officials in connection with certain international crimes, have far-reaching implications. This evolution of events and the corresponding principles it has spawned, if not jettisoning head-of-state immunity altogether, persuades this Court of at least this much: that no sufficient grounds exist in statutes, legislative history, case law or principles of international comity for extending the doctrine of inviolability to deny recognition of the process served on Mugabe and Mudenge on behalf of ZANU-PF under the unique circumstances present here.

IV. JURISDICTION

A. PERSONAL JURISDICTION

Concluding its review of personal jurisdiction over ZANU-PF, the Court considered Plaintiffs' assertions that ZANU-PF and its senior officers were present in the United States "availing themselves and their property of the security and sanctuary of the United States and the state of New York engaging in press and other activities."[205] They further allege that at the time process was served on Mugabe and Mudenge on behalf of ZANU-PF, these officials, in their capacities as senior officers of ZANU-PF, were attending a political function sponsored by the "Friends of ZANU-PF" whose purpose was to rally support for ZANU-PF and Mugabe's regime. Accepting these allegations to constitute sufficient

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[205] Compl. ¶ 11. The Complaint does not further elaborate on how extensive, systematic or continuous ZANU-PF's activities were in New York or the United States. Given ZANU-PF's default, however, any deficiency in and objection to personal jurisdiction on these grounds are deemed waived. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 ("[T]he failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of objection.").

minimal contacts to satisfy due process concerns for jurisdictional purposes and recognizing the validity of Plaintiffs' service of process on ZANU-PF as giving adequate notice of this action, the Court concludes that the basic prerequisites for its exercise of personal jurisdiction over ZANU-PF have been fulfilled so as to allow the action to proceed as against ZANU-PF and Plaintiffs' motion for default judgment to be granted.

B. SUBJECT MATTER JURISDICTION

Substantively, Plaintiffs claim that their causes of action arise under the ATCA, [206] the TVPA, [207] the general federal-question jurisdictional statute[208], as well as various sources defining fundamental norms of international law.[209]

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[206] 28 U.S.C. § 1350.

[207] Pub. L. 102-256, 106 Stat. 73 (Mar. 12, 1992) (codified at 28 U.S.C. § 1350 Note).

[208] *See* 28 U.S.C. § 1331. Because the Court rests its resolution of this matter on the other grounds asserted, it does not address the § 1331 basis, as to which considerable uncertainty exists. *See Kadic*, 70 F.3d at 246; *Filartiga*, 630 F.2d at 888 n.22; *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779-80 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *Xuncax*, 886 F. Supp. at 193-94; *but cf. Abebe-Jiri v. Newego*, No. 90 Civ. 2010 (GET), 1993 WL 814304 (N.D. Ga. 1993), *aff'd*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987).

[209] *See* Compl. ¶ 10 (specifically citing "among others, the 1949 Geneva Conventions, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, United Nations Charter, Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights."). The Court notes that Plaintiffs' complaint repeatedly characterizes the conduct ascribed to ZANU-PF and the other defendants as a campaign of terrorism. *See* Compl. ¶¶ 1, 2, 4. Plaintiffs, however, do not specifically base any of their substantive claims on violations of international law relating to terrorism, nor do they cite to any relevant international instrument on this subject. The Court therefore does not address these issues, for the additional reason that in this area clearly established definitions or widely recognized principles have yet to emerge. *See, e.g., Tel-Oren*, 726 F.2d at 795,

For the purposes of this proceeding, the Court finds that the ordeals of torture, extrajudicial killings and other atrocities which Plaintiffs assert characterized the campaign of lawlessness and terror ZANU-PF inflicted upon them fall within the scope of the conduct encompassed by the TVPA and violations of international law cognizable under the ATCA. The Court finds sufficient support for this conclusion in case law sustaining claims grounded on acts characterized

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where Judge Edwards noted in his concurrence: "[w]hile this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus."

Nonetheless, terrorism has been the subject of several institutional statements of condemnation by the international community, and of regional and conduct-specific conventions. In this regard, momentum towards a rule of international law proscribing terrorism is gaining, just as carefully-planned, well-financed acts of terror with devastating consequences are also on the rise. *See, e.g.*, G.A. Res. 40/61, *reprinted in*, 25 I.L.M. 239 (1986) (the United Nations General Assembly "[u]nequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security."); Convention for the Suppression of Unlawful Seizure of Aircraft, *done* December 16, 1970, *ratified* September 14, 1971, 22 U.S.T. 1641; United Nations: International Convention for the Suppression of Terrorist Bombing, *opened for signature* January 12, 1998, *entered into force* May 23, 2001, 37 I.L.M. 249 (1998). Although the United States is a signatory, it has not yet ratified the Convention on Terrorist Bombings. As of the date of this Decision and Order, there are 58 signatories and 29 parties to the Convention. *See also* S.C. Res. 1373 (September 28, 2001) (the Security Council, in reaffirming its unequivocal condemnation of the terrorist attacks which took place on September 11, 2001 in New York, Washington, D.C. and Pennsylvania, declared that it regards such acts, like any act of international terrorism, to constitute a threat to international peace and security, and it urged states, among other measures, to prevent and suppress the financing of terrorist acts, to criminalize the provision of financial support for terrorists, to freeze their assets and to refrain from providing any form of safe haven or support to entities or persons involved in terrorist acts).

by similar lawlessness and extreme brutality found to have breached recognized international standards.[210]

Whether liability properly could be imposed upon ZANU-PF for its role in these wrongs raises substantial questions that merit consideration and comment at this point. Though not specifically addressed by the parties before the Court, a significant issue arises with respect to the applicability of the ATCA and the TVPA to ZANU-PF. ZANU-PF's liability under the ATCA and TVPA rests on the extent to which statutes authorizing causes of action grounded on violations of international law apply to private individuals as opposed to state officials acting with express or implied governmental authority or under color of law. A corollary of this inquiry is whether the reference to "individuals" in this context means particular natural persons only, or also encompasses organized collective groups and institutions such as ZANU-PF. These questions must be addressed because they implicate the Court's subject matter jurisdiction, the absence of which cannot be waived or ignored.[211] The underlying issue has engendered substantial debate which has not fully resolved the doubts that some courts have expressed.[212] Accordingly, in authorizing the default

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[210] *See Kadic*, 70 F.3d at 237; *Hilao*, 25 F.3d at 1475; *Filartiga*, 630 F.2d at 878-79; *Cabiri*, 921 F. Supp. at 1191; *Xuncax*, 886 F. Supp. at 169-71, 179.

[211] *See Insurance Corp. of Ireland*, 456 U.S. at 702.

[212] *See Kadic*, 70 F.3d at 239-45 (holding that certain forms of conduct violate international law "whether undertaken by those acting under the auspices of a state or only as private individuals."); *Tel-Oren*, 726 F.2d at 791-95 (Edwards, J., concurring) (noting an absence of codification or international consensus on whether torture perpetrated by other than a recognized state or its officials acting under color of state law violates the law of nations, while acknowledging some case law and commentary assuming or urging that private individuals may be the subjects of international law); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (in a case against United States officials arising out of the evacuation of certain children from Vietnam and airlifting them to this country during the end of United States involvement in Vietnam, the court noted in dicta that jurisdiction under the ATCA

judgment against ZANU-PF, this Court feels compelled to consider the threshold substantive question.

As a preliminary matter, it is noteworthy that the default judgment authorized here is rendered not against particular individuals representing ZANU-PF but presumably against the collective entity itself in whatever legal form it exists. This result gives expression to a vital modern reality. Though much of international law reflects the view that only sovereign states are the subjects of international law, entitling only them to invoke rights and possess duties derived from the law of nations, this notion has come increasingly under question.[213] Even classical formulations of the concept admitted exceptions for some private acts committed by individuals, such as genocide, war crimes, piracy and slave trading.[214]

More recently, prompted by the wider recognition and assertions of international human rights, the rights and roles of individuals as subjects of international law—as both victims

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conceivably could exist if the private adoption agencies that participated in the "Babylift" were joined in the action as potential joint tortfeasors); *Doe I v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 8 (D.D.C. 1998) (finding jurisdiction under the ATCA in an action brought against an umbrella political organization); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (stating that in the context of the ATCA, violation of the law of nations means "at least a violation by one or more individuals"); *Adra v. Clift*, 195 F. Supp. 857, 864-65 (D. Md. 1961) (establishing jurisdiction under the ATCA in a case alleging violation of international law by an individual—misuse of passports to bring into the United States a child involved in a custody battle); *see also* 1 C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, § 2A, at 4 (2d. ed. rev. 1945); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 Am. U. L. Rev. 1, 9-10 (Fall 1982).

[213] *See Kadic*; 70 F.3d at 239-45; Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* 196-223 (1999); Sohn, *supra* note 212, at 1.

[214] *See Kadic*, 70 F.3d at 239; *Restatement (Third) of Foreign Relations Law*, pt. II, Introductory Note ("Individuals may be held liable for offenses against international law, such as piracy, war crimes or genocide.").

and violators—have assumed greater prominence and have been given broader expression in the development of international norms.[215]

An offshoot of these developments is growing recognition of a reality reflected in the matter now before this Court. Barbaric offenses committed in violation of established international standards do not always spring from spontaneous acts of violence wreaked by random individuals or government agencies. Rather, they sometimes represent the culmination of elaborate schemes devised by expertly-organized and well-financed private groups. These entities give their causes names, banners and emblems for their doctrines and recruits, and bank accounts with which to carry out their inglorious business. The wrongful enterprise may seek political or economic ends and, not uncommonly, as is alleged here, may derive critical nurture and command from the not so invisible hand of the state or from rogue government officials who share the lawless and injurious goals of the particular group or venture and who use the cover of law to promote its private ends. At times, the masterminds and managers who hatch these plans are high-ranking leaders of the state who then employ public and private surrogates to implement their unofficial deeds. Under some circumstances, such as those prevailing here, the leaders may be eligible to

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[215] *See* Franck, *supra* note 213, at 196-223; Sohn, *supra*, note 212, at 1 ("States have had to concede to ordinary human beings the status of subjects of international law . . . .").

Professor Franck notes that although "[t]he ensuing canon of human rights laws has only partially fulfilled the aspirations of those heady postwar years . . . a radical new idea has gained currency: that individuals can hold their governments accountable before an international tribunal applying globally adopted principles of personal rights." Franck, *supra*, note 213, at 198-206. Furthermore, individuals are asserting their emerging rights in the face of "violations of personal rights that are now formally protected by international law and are judged in accordance with principles of law and legal reasoning, much as if the same issues had been raised before the Supreme Courts of India or the United States." *Id.* at 204.

assert some form of official immunity from court jurisdiction, or may otherwise possess the methods and means to escape personal liability for actions carried out by the subordinates used as accomplices and pawns.

Like all other civil remedies, the causes of action authorized by the ATCA and TVPA are intended to compensate victims and punish and deter the perpetrators. Were liability in such cases to be limited so as to permit recovery only from the particular natural individuals who actually commit the underlying wrongful acts, the result would effectively nullify the purposes of the statutes. Frequently the role of specified front-line actors in larger conspiracies is merely to execute the plans or follow orders issued by the scheme's leaders and institutional organizers. The lesser participants, though no less responsible, may have the least ability to evade jurisdiction or to satisfy a judgment of liability. Conversely, to exempt the organized perpetrators would allow an escape for actors with primary responsibility, encourage subterfuge and release the only players who may possess the resources to enable collection on any judgment rendered to the victims of the unlawful scheme.

Though the courts have not specifically addressed these concerns in the few recorded instances where claims against organized political organizations and other private entities have been lodged alleging violations of international norms, such claims have been sustained, giving recognition to the application of international law to some conduct of private actors.[216] These cases have entailed the application of widely

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[216] *See, e.g., Islamic Salvation Front*, 993 F. Supp. at 8 (upholding a claim against an umbrella organization of extremist Islamic groups opposed to the governing military regime in Algeria and accused of instigating a campaign of atrocities against women and political opponents); *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 890-92 (C.D. Cal. 1997) (sustaining a claim under the ATCA brought against a private corporation that entered a joint venture with state actors to develop a commercial project employing forced labor); *Adra*, 195 F. Supp. at 864- 65; *see also Klinghoffer*, 937 F.2d at 54; *but cf. Tel-Oren*, 726 F.2d at 792 (Edward, J., concurring).

recognized international human rights standards to impose individual liability on organized non-state actors under two distinct circumstances: (1) when the individuals' deeds are done in concert with governmental officials or with their significant assistance, which thus may be deemed to constitute state action or conduct taken under the color of state law; and (2) when the individuals commit acts independently of any state authority or direction, especially encompassing more egregious conduct, such as genocide, war crimes or other crimes against humanity.[217]

In significant respects, the development of international law in this area parallels the history of sovereign immunity of states, described above, that gave rise to the FSIA and comparable legislation in other countries. These statutes were designed to prevent the abuses associated with states engaging in trade through essentially private corporate entities cloaked with sovereign immunity. Just as under some interpretation and application of the FSIA, individuals acting in official capacities now may be regarded as embodying agencies and instrumentalities of the state, and as such may be entitled to assert sovereign immunity,[218] some non-state entities should be deemed individuals for the purposes of effectively applying statutes like the ATCA and the TVPA that rely upon state action as an element of liability, at least when the private schemes are significantly incubated, aided or carried out in concert with government officials.

1. The Alien Tort Claims Act

The ATCA confers upon federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[219] Thus, to satisfy subject matter jurisdiction

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217 *See generally Kadic*, 70 F.3d at 239-40; *see also* Ronald C. Slye, *International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law*, 2 Chi. J. Int'l L. 59, 70 (Spring 2001).

218 *See supra* notes 95-98 and accompanying text.

219 28 U.S.C. § 1350.

under the ATCA, three conditions must be satisfied: the action must be (1) brought by an alien; (2) alleging a tort; (3) committed in violation of international law.[220] Neither of the first two elements are disputed here: all named Plaintiffs are citizens of Zimbabwe, and the allegations state well-recognized torts. It is the nature and scope of the third element which require closer legal scrutiny. The ATCA, unlike the TVPA, does not explicitly require that the wrongful conduct be carried out under actual or apparent authority or color of law of a foreign state.[221] Nonetheless, whether such a requirement exists as a matter of customary international law and therefore constitutes a corollary condition to satisfy subject matter jurisdiction in an action under the ATCA has been the subject of significant debate.[222]

In applying the ATCA to allegations of official torture, the Second Circuit in *Filartiga* declared: "Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[223] In *Kadic*, addressing the evolution of related principles fifteen years after *Filartiga*, the Circuit Court reaffirmed this instruction.[224] There, the court rejected the notion "that the law of nations, as understood in the modern era, confines its reach to state action," and ruled instead that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[225]

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[220] *See Kadic*, 70 F.3d at 238.

[221] *See id.* at 239, 241; *Islamic Salvation*, 993 F. Supp. at 3-9.

[222] *See Kadic*, 70 F.3d at 238-40; *Tel-Oren*, 726 F.2d at 791-95 (Edwards, J., concurring); *Islamic Salvation Front*, 993 F. Supp. at 7-8.

[223] *See* 630 F.2d at 881 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)); *see also Tel-Oren*, 726 F.2d at 777 ("[T]he 'law of nations' is not stagnant and should be construed as it exists today among the nations of the world.").

[224] *See* 70 F.3d at 239.

[225] *Id.*

The Second Circuit then held that among the specific acts which violate contemporary international norms, whether committed by state officials or private individuals, are genocide and war crimes. With regard to torture and summary execution, the court declared that, when not perpetrated in the course of genocide or war crimes, these acts are proscribed by international law only when committed by state officials or under the color of law.[226] In this connection, the Court instructed that applicable principles from the jurisprudence of § 1983 of the Civil Rights Act[227] should guide the courts in reaching those determinations.

In the case at bar, the complaint alleges that, acting under Mugabe's command and control, ZANU-PF officials inflicted a "brutal campaign of murder, torture, terrorism, rape, beatings, and destruction of property against Zimbabwean citizens and residents suspected of supporting the opposition political party . . . ."[228] The mission of terror was specifically designed to perpetuate Mugabe's rule and secure the dominant position of power held by ZANU-PF in the executive and legislative branches of Zimbabwe's government since 1980.[229] The complaint avers that the deliberate and systematic wrongs alleged were inflicted with the participation and assistance of the Zimbabwe military, Central Intelligence Organization, Republic Police and the Zimbabwe War Veterans Associations ("ZWVA").

More specifically, Plaintiffs claim that ZANU-PF "has relied on its position as the unrivaled and dominant force in the Government to illegally direct and force the military and police to assist in the unlawful activities of ZANU-PF and ZWVA."[230] According to the complaint, for example, ZANU-PF employed government officials and other public

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[226] *See id.* at 243-45.

[227] 42 U.S.C. § 1983.

[228] Compl. ¶ 15.

[229] *Id.* at ¶¶ 15, 19.

[230] *Id.* at ¶ 17.

resources in its unlawful activities. The party allegedly engaged and paid the ZWVA and its operatives $20 million to form an organized force of armed militias charged with invading and occupying the land of ZANU-PF's political opponents, especially targeting white farmers.[231] These farm occupations resulted in thousands of recorded incidents of violence in the course of which, while police looked on and took no action, some Plaintiffs suffered physical attacks or their relatives were killed.[232] Plaintiffs assert that ZANU-PF's violent movement employed other Zimbabwe government equipment and facilities, such as transportation, communications and coordination, and, at Mugabe's behest, was placed under the command of Zimbabwe's Head of the Air Force.[233]

These accusations amply demonstrate that ZANU-PF did not consist merely of loosely connected, haphazardly organized individuals, or a misguided mob of marauders randomly roving and unleashing terror throughout Zimbabwe. Rather, Plaintiffs' factual assertions and supporting evidence suggest that in carrying out the drive of organized violence and methodic terror portrayed here ZANU-PF worked in tandem with Zimbabwe government officials, under whose direction or control many of the wrongful acts were conceived and executed. On the facts presented, ZANU-PF thus became an integral arm of the state through which its apparent power extended to the wrongdoers. Accordingly, the Court concludes that Plaintiffs' claims allege conduct taken by ZANU-PF in concert with Zimbabwe officials or with significant assistance from state resources sufficient, under *Kadic's* instruction,[234] to satisfy the standard of what constitutes involvement by government officials in the conduct of non-state actors. Plaintiffs' allegations and related evidence support the "color of law" and state action

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231 *Id.* at ¶ 44.

232 *Id.* at ¶¶ 5, 12.

233 *Id.* at ¶ 47.

234 *See Kadic*, 70 F.3d at 244-45.

requirements for the purposes of Plaintiffs' action against ZANU-PF under the ATCA.[235]

2. The Torture Victim Protection Act

The TVPA recognizes a cause of action for victims of official torture and extrajudicial killing against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation . . . ."[236] While the statute creates a cause of action, it does not itself, unlike the ATCA, confer federal court jurisdiction.[237] A victim seeking to exercise the right to sue established by the statute must rely upon a grant of federal jurisdiction provided in some other enactment, most notably the ATCA itself.[238]

The TVPA's legislative history confirms that the state action condition was intended to make clear that a plaintiff "must establish some governmental involvement in the torture or killing to prove a claim" and that the statute "does not attempt to deal with torture or killing by purely private groups."[239] The state action requirement was underscored by the Second Circuit in *Kadic*, where the court stated that torture and summary execution "are proscribed by international law only when committed by state officials or under color of law."[240]

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[235] *See id.*; *see also Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 (1982); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) ("The State has so far insinuated itself into a position of interdependence with [the defendant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."); *Jensen v. Farrell Lines, Inc.*, 625 F.2d 379, 382 (2d Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

[236] 28 U.S.C. § 1350 Note, at § 2(a).

[237] *See Kadic*, 70 F.3d at 246.

[238] *See id.*

[239] *Kadic*, 70 F.3d at 245 (citing H.R. Rep. No. 102-367, 102d Cong., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87).

[240] *Id.* at 243 (citing the Convention Against Torture, pt. I, art 1) (defining torture as "inflicted by or at the instigation of or with the

The Circuit Court there also provided guidance with regard to the interpretation of the TVPA's state action or color of law requirement that mirrors the court's analysis and application of the ATCA. It instructed that in construing the terms "actual or apparent authority" and "color of law", principles of agency law and the jurisprudence under § 1983 of the Civil Rights Act[241] would serve as a relevant guide. To this end, the court recognized that private individuals may act under color of law for TVPA purposes when they act in concert with state officials or with significant state aid.[242]

The underlying unlawful and injurious campaign carried out by ZANU-PF, as described above, allegedly employed government equipment and facilities such as transportation, communications and coordination, and were under the command of Zimbabwe's Air Force at the behest of Mugabe. [243] Plaintiffs' assertions of involvement or significant assistance by high-ranking Zimbabwe government officials in ZANU-PF's campaign of torture and summary killings that form the basis for the color of law element of Plaintiffs' claim under the ATCA also serve to satisfy the jurisdictional prerequisite as regards their TVPA cause of action. Accordingly, the Court concludes that Plaintiffs have established subject matter jurisdiction for their claim against ZANU-PF under the TVPA and that Plaintiffs' motion for entry of default judgement against ZANU-PF should be granted on this ground as well.

V. CONCLUSION

This analysis ends on a mixed note. The Court is not unmindful of the enormity of the atrocities Plaintiffs so movingly and vividly portray. After depicting the "sustained campaign of murder, violence, intimidation and harassment

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consent or acquiescence of a public official or other person acting in an official capacity").

[241] *See* 42 U.S.C. § 1983.

[242] *See Kadic*, 70 F.3d at 245-46 (citing *Lugar*, 457 U.S. at 937).

[243] *See* Compl. ¶ 47.

by President Mugabe and the ruling ZANU-PF Party" against political opponents and others, Plaintiffs deplore that the State Department's honoring of the defendants' assertion of immunity "does not dispute that the plaintiffs have suffered extrajudicial killing and torture in violation of international law, but it tells the Court that, in this case, immunity trumps justice."[244]

But Plaintiffs' eloquence alone does not equate to law. Nor, regrettably, is the law always as eloquent as we may wish it to be, especially when its outcomes may not comport with our own conception of the ideal. Certainly, torture, extrajudicial killings and other forms of deliberate brutality, anytime, anywhere, pierce the inner core of human baseness and cross the outer crusts of infamy. And if such a thing could be conceived—as the void that one step beyond infinity would occupy—that already vast barbarism and disgrace could be surpassed, the limit may exist where conditions prevail such as those asserted here: where misdeeds imbued with such profound depravity are committed against innocents among their own people by the highest leaders of the state.

Not infrequently courts confront events that cry out loudly for immediate justice. And sometimes those occasions make the judges feel that their hands are tied by demands exerting more compelling pressures and pulls that also define justice, though some other way not always to everybody's liking. Instances like these rank among the most trying moments of judicial experience. At a hand-wringing and heart-rending point just such as this, another court observed that "[t]he FSIA is absolute in this regard, no matter how heinous the alleged illegalities."[245] That remark sounds a harsh note. It seems

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[244] Plaintiffs' Brief, at 7, 9.

[245] *Herbage*, 747 F. Supp. at 67; *see also Sabbatino*, 376 U.S. at 436-37 ("However offensive to the public policy of this country and its constituent States an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application."); *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897)

unfitting for the moment, even if extenuation somehow could impart comfort to another person, or ease one's own qualms and constraints. But the point is not the severity of the judgment.

The purpose of diplomatic and head-of-state immunity is not to cover up heinous deeds from coming to the light of day, or to protect a nation's leaders from accountability for their acts and, by shielding them from reprisals, tacitly condone their wrongs. If there is a larger end here to be served, for which accusations of grave misconduct as between particular individuals may be momentarily set aside, it is in the interest of comity among nations—to safeguard friendly relations among sovereign states.

This is a value judgment sovereigns make and honor mutually, each leaving to their own domestic methods—and to any measures permissible under customary international rules—the time and the means to guide the advent of the day of reckoning for the sovereign leader's wrongs: when and how that justice deferred is to be judged. And so, for Plaintiffs here, if their accusations are true, all is not lost. There is a lesson to be learned both from recent events and from the course of the law in this area, as *Marcos*, *Kadic*, *Filartiga* and other recent cases illustrate, and as the even more contemporaneous experiences of Augusto Pinochet and Slobodan Milosevic confirm. These precedents instruct that resort to head-of-state and diplomatic immunity as a shield for private abuses of the sovereign's office is wearing thinner in the eyes of the world and waning in the cover of the law. The prevailing trend teaches that the day does come to pass when those who violate their public trust are called upon, in this world, to render account for the wrongs they inflict on innocents.

("It is idle to argue that the proceedings of those who triumphed [in a political revolution] should be treated as the acts of baditti, or mere mobs."); *Alicog*, 860 F. Supp. at 385 ("The courts cannot invade the executive and legislative prerogative by keeping cases alive that fall within the discretionary function exception, even if they contain scandalous allegations of multiple wrongs.").

In the meantime, however, in the balancing of larger public values and priorities, individual claims sometimes unavoidably and regrettably end up with the shorter weight. But until that more opportune day arrives, these are choices that, as between sovereigns, in the interest of comity among nations and in the context of universally accepted principles governing relations among states, sovereign nations are entitled to make unhindered by the second-guesses of their courts.

Not to conclude on an unduly dour tone, the Court offers a final comment. In guiding the growth of common law, it is well to keep in mind that we would not be true to the task nor rise to its multiple challenges were we to ignore the world and the times we live in. Today, events around us bear witness almost daily to the destructive power of individuals whose chosen way of life is to do wrong by inflicting harms of mass proportions. With modern means, the hands of one or a few persons hold the force sufficient to wreak in moments wanton devastation and horror of a magnitude that it once took whole armies to inflict. The response through the rule of law to such large acts of terror has lessons useful to recall, by the wisdom of which this Court has sought to steer the judgment it renders today.

Generally evil works by stealth and craft. It has many guiles and guises. It employs an ever-larger arsenal of lawless methods and devices. To iniquity's purpose of propagating large-scale grief, as evidenced in the case at hand, its capacity for injustice is virtually limitless because it honors none of the self-imposed restraints that contain the conduct of the civilized world within decent bounds. It is well to consider also that justice and injustice, paired like strands of life, normally travel hand in hand, their union joined in direct proportion. Every injustice gives rise to a call for justice that expands to the limits of the injuries suffered or perceived. The greater the wrong, the louder the cry for right to be requited.

In the light of these observations, the vanguard of the law should stand ready to adapt as appropriate, to shape redress and remedy so as to answer measure for measure the particular

evil it pursues. Yet, while remaining no less resilient and resourceful than its counterpoise, the pathway of justice must always be mindful of the affirmative values it protects and the perils it guards against. Like the contours and relation of hand and glove, justice must stay outside and above the evil it encloses, while not becoming a part of it. This prompting reflects not just an act of self-preservation, but a reaffirmation of a principle embodied in our legal system that prominently stands out and has long held us in good stead: that survival itself is worth all the more when its end point is grounded on rules that are right, reasoned and just.

ORDER

For the reasons discussed above, it is hereby

ORDERED that Plaintiffs' motion for entry of a default judgment against defendants Mugabe and Mudenge is denied; and it is further

ORDERED that Plaintiffs' claims against Mugabe, Mudenge and Moyo are dismissed; and it is further

ORDERED that Plaintiffs' motion for entry of a default judgment against defendant ZANU-PF is granted; and it is finally

ORDERED that this matter be referred to the designated Magistrate Judge for an inquest on damages arising from the liability determined herein relating to defendant ZANU-PF.

SO ORDERED.

Dated: New York, New York
30 October 2001

/s/ Victor Marrero
Victor Marrero
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	8/30/05
Docket Number:	03-6033-cv
Short Title:	Tachiona v. Mugabe
DC Docket Number:	00-cv-6666
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Victor Marrero

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 30 day of August two thousand five.

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, EFRIDAH PFEBVE, ON HER OWN BEHALF AND ON BEHALF OF HER LATE BROTHER METTHEW PFEBVE, ELLIOT PFEBVE, ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHER METTHEW PFEBVE, EVELYN MASAITI, ON HER OWN BEHALF, MARIA DEL CARMEN STEVENS, ON HER OWN BEHALF, ON BEHALF OF HER LATE HUSBAND DAVID YENDALL STEVENS, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees-
Cross-Appellants,

ROBERT GABRIEL MUGABE, IN HIS INDIVIDUAL AND PERSONAL CAPACITY, ZIMBABWE AFRICAN NATIONAL UNION-PATRIOTIC FRONT, STAN MUDENGE, JONATHAN MOYO, CERTAIN OTHER UNKNOWN NAMED SENIOR OFFICERS OF ZANU-PF,

Defendants,

v.

UNITED STATES OF AMERICA,

Intervenor-Appellant-
Cross-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Plaintiffs-Appellees-Cross-Appellants Adella Chiminya, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ Arthur Heller

Motion Staff Attorney

APPENDIX F

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 18, 2005

Ms. Mary Ellen Callahan
555 Thirteenth Street, NW
Washington, DC 20004

Re: Adella Chiminya Tachiona, on Her Own Behalf and on Behalf of Her Late Husband Tapfuma Chiminya Tachiona, and on Behalf of All Others Similarly Situated, et al.
v. United States
Application No. 05A451

Dear Ms. Callahan:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on November 18, 2005 extended the time to and including January 12, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Ann McCamey
Ann McCamey
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Ms. Mary Ellen Callahan
555 Thirteenth Street, NW
Washington, DC 20004

Mr. Paul D. Clement
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

APPENDIX G

PERTINENT STATUTORY PROVISIONS

28 U.S.C. § 1350 (Alien Tort Statute) provides:

§ 1350. **Alien's action for tort.**

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

* * *

28 U.S.C. § 1350 note (Torture Victim Protection Act), Pub. L. No. 102-256, Mar. 12, 1992, 106 Stat. 73, provides:

Section 1. Short Title. This Act may be cited as the "Torture Victim Protection Act of 1991."

Sec. 2. Establishment of civil action.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Sec. 3. Definitions.

(a) Extrajudicial killing.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering sub-

stances or other procedures calculated to disrupt profoundly the senses or personality.

(2)

APR 14 2006
OFFICE OF THE CLERK

No. 05-879

In the Supreme Court of the United States

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
LEWIS S. YELIN
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Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the United States had standing to appeal from the district court's judgment in this case.

2. Whether the court of appeals correctly held that the president and foreign minister of Zimbabwe were not subject to service of process during a period when they were present in the United States to attend a conference at the United Nations.

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In the Supreme Court of the United States

No. 05-879

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 386 F.3d 205. The opinions of the district court (Pet. App. 29a-96a, 97a-120a, 121a-216a) are reported at 234 F. Supp. 2d 401, 186 F. Supp. 2d 383, and 169 F. Supp. 2d 259, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2004. A petition for rehearing was denied on August 30, 2005 (Pet. App. 217a-218a). On November 18, 2005, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including January 12, 2006, and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article II, Section 2 of the Constitution states that the President "shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Article II, Section 3 assigns to the President the power to "receive Ambassadors and other public Ministers." Although the immunity of foreign states from suit in United States courts has been governed since 1976 by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, the FSIA does not address the immunity of foreign heads of state. Since the passage of the FSIA, the federal courts have consistently recognized the binding nature of Executive Branch assertions that a foreign head of state is immune from the jurisdiction of United States courts.[1]

2. Two treaties govern the immunities of foreign dignitaries when they are visiting the United States to attend conferences convened by the United Nations (U.N.). First, the Convention on Privileges and Immunities of the United Nations (U.N. Convention), which was adopted by the U.N. General Assembly on February

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[1] See, *e.g.*, *Wei Ye* v. *Jiang Zemin*, 383 F.3d 620, 625-626 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005); *Leutwyler* v. *Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001); *First Am. Corp.* v. *Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996); *Lafontant* v. *Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994); *Saltany* v. *Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), aff'd in part and rev'd in part, 886 F.2d 438 (D.C. Cir. 1989) (per curiam), cert. denied, 495 U.S. 932 (1990); cf. *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (accepting Executive Branch's denial of head-of-state immunity), cert. denied, 523 U.S. 1060 (1998).

13, 1946, and ratified by the United States on April 15, 1970, enumerates various privileges and immunities that temporary envoys to United Nations conferences shall enjoy "while exercising their functions and during their journey to and from the place of the meeting." U.N. Convention art. IV, § 11, 21 U.S.T. 1418, 1426, 1 U.N.T.S. 15, 20. *Inter alia*, the U.N. Convention vests such envoys with "immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind." Art. IV, § 11(a), 21 U.S.T. at 1426, 1 U.N.T.S. at 20. The U.N. Convention further provides that temporary representatives to United Nations conferences shall enjoy "such other privileges, immunities and facilities not inconsistent with [those previously enumerated in Section 11] as diplomatic envoys enjoy." Art. IV, § 11(g), 21 U.S.T. at 1428, 1 U.N.T.S. at 22.

The Vienna Convention on Diplomatic Relations (Vienna Convention), which was opened for signature on April 18, 1961, and ratified by the United States on November 8, 1972, 23 U.S.T. 3227, 500 U.N.T.S. 95, specifies the privileges and immunities of diplomatic envoys generally. The Vienna Convention provides diplomatic envoys with broad immunity from the civil jurisdiction of United States courts, subject to three limited exceptions that are not relevant to this case. Vienna Convention art. 31(1), 23 U.S.T. at 3240, 500 U.N.T.S. at 112. In addition, the Vienna Convention makes the "person of a diplomatic agent * * * inviolable" and requires the "receiving State [to] treat him with due respect and [to] take all appropriate steps to prevent any attack on his

person, freedom or dignity." Art. 29, 23 U.S.T. at 3240, 500 U.N.T.S. at 110.

3. Petitioners are five citizens of Zimbabwe and the estates of three deceased Zimbabweans. Petitioners filed suit in the Southern District of New York, naming as defendants Robert Mugabe, the President of Zimbabwe; Stan Mudenge, the country's Foreign Minister; and the Zimbabwe African National Union-Patriotic Front (ZANU-PF), a political party of which Mugabe and Mudenge are senior officers. Pet. App. 2a-3a. Petitioners based their claims on 28 U.S.C. 1350; the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note; and "international human rights norms." Pet. App. 2a. Petitioners alleged that the defendants had engaged in egregious human rights violations against them because of petitioners' political activity in Zimbabwe. *Id.* at 3a; see Pet. 4.[2]

In September 2000, Mugabe and Mudenge visited New York City as part of an official Zimbabwean delegation attending the Millennium Summit at the United Nations. Pet. App. 3a. Petitioners delivered the summons and complaint to Mugabe just before he entered a building where he was to speak at a private political rally and fundraiser. *Ibid.* Mudenge was given the summons and complaint the following day during the same

[2] The United States has previously expressed its opposition to the repressive actions of the Zimbabwean government. See, *e.g.*, Exec. Order No. 13,288, 3 C.F.R. 186 (2004) (blocking property of persons undermining democratic processes or institutions in Zimbabwe); Proclamation No. 7524, § 1(a), 3 C.F.R. 10 (2003) (suspending entry into the United States of "[s]enior members of the government of Robert Mugabe and other Zimbabwe nationals who formulate, implement, or benefit from the policies that undermine or injure Zimbabwe's democratic institutions").

official visit to New York City. *Ibid.* Those actions were the sole means by which petitioners attempted to serve process on the defendants, including ZANU-PF. None of the defendants responded to petitioners' complaint or appeared before the district court. *Ibid.* Based on the defendants' failure to appear in the suit, petitioners sought a default judgment. *Id.* at 128a.

After receiving a diplomatic request from Zimbabwe, the United States filed a suggestion of immunity pursuant to 28 U.S.C. 517. Pet. App. 3a & n.1. The government's filing informed the district court that petitioners' suit should be dismissed because Mugabe and Mudenge were entitled to head-of-state immunity, as well as to diplomatic immunity under the U.N. and Vienna Conventions. *Id.* at 3a; see C.A. App. 327, 336. The government further asserted that both types of immunity conferred "personal inviolability" on Mugabe and Mudenge as foreign dignitaries visiting the United States, and that any attempted service of process on them—whether in their personal capacities or as agents of ZANU-PF—should be treated as a nullity. See Pet. App. 3a-4a.

4. The district court held that Mugabe and Mudenge enjoyed both head-of-state and diplomatic immunity at the time they were served, and that petitioners' claims against those defendants therefore could not proceed. See Pet. App. 179a, 188a. The court nevertheless rejected the government's contention that the attempted service of process upon Mugabe and Mudenge must be treated as a legal nullity in determining ZANU-PF's susceptibility to suit. See *id.* at 188a-200a. The district court noted that ZANU-PF itself did not possess any immunity from suit, see *id.* at 190a, and it rejected the government's contention that courts must give conclusive effect to the State Department's views regarding

the scope of head-of-state immunity in contexts such as this, see *id.* at 193a.

The government sought reconsideration of the district court's ruling that petitioners had properly effected service of process on ZANU-PF through Mugabe and Mudenge. See Pet. App. 98a. Pursuant to Federal Rule of Civil Procedure 24, the government also moved to intervene for the purpose of taking a later appeal. Pet. App. 114a. The district court denied the motion for reconsideration but granted the motion to intervene. *Id.* at 120a. The court subsequently entered a default judgment against ZANU-PF and awarded petitioners more than $71 million in compensatory and punitive damages. *Id.* at 5a, 94a-96a.

5. The United States appealed the default judgment entered against ZANU-PF, and petitioners cross-appealed the district court's dismissal of their claims against Mugabe and Mudenge. The court of appeals affirmed in part and reversed in part, holding that petitioners' complaint should have been dismissed in its entirety. Pet. App. 1a-28a.

a. The court of appeals first held that the United States had standing to appeal the district court's judgment. Pet. App. 5a-11a. The court explained that, to have standing to appeal, a litigant must demonstrate an injury caused by the lower court's judgment. *Id.* at 5a. The court concluded that the United States was injured by the default judgment against ZANU-PF because that judgment impaired the ability of the United States (i) to ensure its compliance with its treaty obligations and (ii) to establish the terms upon which foreign diplomats are received. *Id.* at 11a.

b. The court of appeals affirmed the district court's dismissal of petitioners' claims against Mugabe and

Mudenge. Pet. App. 12a-22a. The court recognized that Section 11(a) of the U.N. Convention is inapplicable to this suit because immunity under Section 11(a) is limited to "acts done by [temporary representatives] in their capacity as representatives," and petitioners' claims do not arise out of such acts. *Id.* at 13a (quoting U.N. Convention art. IV, § 11(a), 21 U.S.T. at 1426, 1 U.N.T.S. at 20). The court observed, however, that Section 11(g) of the U.N. Convention extends to temporary representatives any additional privileges and immunities that are afforded to diplomatic envoys so long as those privileges and immunities are "not inconsistent with" Section 11(a)-(f). *Ibid.* (quoting U.N. Convention art. IV, § 11(g), 21 U.S.T. at 1428, 1 U.N.T.S. at 22). The court explained that the Vienna Convention grants diplomatic envoys "a much more robust form of immunity from legal process than that afforded by section 11(a) of the U.N. Convention on Privileges and Immunities," since Article 31 of the Vienna Convention "broadly immunizes diplomatic representatives from the civil jurisdiction of the United States courts." *Ibid.*

Petitioners contended that "extend[ing] to Mugabe and Mudenge the full measure of immunity set forth in Article 31 of the Vienna Convention would be 'inconsistent with' section 11(a) of the U.N. Convention on Privileges and Immunities because section 11(a) expressly limits the scope of immunity from legal process that temporary U.N. representatives can enjoy." Pet. App. 14a. The court of appeals rejected that argument. While viewing the phrase "inconsistent with" as ambiguous standing alone (*id.* at 15a), the court concluded that "the understandings of the treaty signatories and the views of the executive branch * * * overwhelmingly support an interpretation of section 11(g) that would

accord the full protection of Article 31 of the Vienna Convention to temporary U.N. representatives." *Id.* at 16a. The court of appeals further held that petitioners' suit does not implicate any of Article 31's limited exceptions to the immunity of diplomatic envoys from civil jurisdiction, see *id.* at 20a-22a, and it therefore affirmed the district court's dismissal of petitioners' claims against Mugabe and Mudenge, see *id.* at 22a.

c. The court of appeals next held that the personal "inviolability" that Mugabe and Mudenge enjoyed under Article 29 of the Vienna Convention (as applied to them through Section 11(g) of the U.N. Convention) precluded petitioners from using them as involuntary agents for service of process on ZANU-PF. Pet. App. 23a-28a. The court observed that personal inviolability is one of the oldest and most universally recognized of diplomatic privileges and immunities, and that it serves both to protect the diplomat's dignity and to ensure that he can perform his responsibilities without hindrance. *Id.* at 27a. The court further explained that the adverse "practical consequences of allowing service of process upon diplomatic agents * * * are equally likely to follow whether the diplomat (or the U.N. representative enjoying diplomatic immunity) is served as an agent for a private entity or as an agent for a foreign government." *Id.* at 28a. The court of appeals therefore concluded that Article 29 "protected Mugabe and Mudenge from service of process as agents for ZANU-PF," and it directed the district court to dismiss petitioners' claims against ZANU-PF for lack of proper service. Pet. App. 28a.[3]

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[3] Because the court of appeals held that the diplomatic immunity and personal inviolability of Mugabe and Mudenge provided a sufficient

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 11-19) that the United States lacked standing to appeal the default judgment entered against ZANU-PF. The court of appeals correctly rejected that argument. See Pet. App. 5a-11a.

a. More than 80 years ago, this Court recognized that the United States has standing to sue to prevent a violation of the government's treaty obligations, even in the absence of statutory authorization for the suit. *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925). The lower federal courts have continued to apply that principle. See, *e.g.*, *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 233-234 (D.C. Cir. 2003) (United States had standing to intervene as defendant to seek dismissal of suit that violated the Algiers Accords), cert. denied, 542 U.S. 915 (2004); *United States* v. *City of Glen Cove*, 322 F. Supp. 149, 152 (E.D.N.Y.) (United States had standing to sue to prevent state action that would violate treaty obligation), aff'd, 450 F.2d 884 (2d Cir. 1971) (per curiam); cf. *United States* v. *County of Arlington*, 669 F.2d 925, 928-929 (4th Cir.) (United States could sue to ensure compliance with treaty obligations), cert. denied, 459 U.S. 801 (1982). Petitioners offer no plausible reason to doubt that the government's interest in ensuring compliance with the United States'

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basis both for affirming the district court's dismissal of petitioners' claims against those individuals, and for reversing the district court's default judgment against ZANU-PF, the court did not decide whether head-of-state immunity would provide an additional ground for dismissal of petitioners' suit. See Pet. App. 22a-23a.

treaty obligations is likewise sufficient to confer standing to appeal.

Contrary to petitioners' contention (Pet. 13), the court of appeals did not abdicate its responsibility to rule on the question of treaty interpretation presented by this case. In resolving the threshold question of appellate jurisdiction, the court of appeals determined that, because the United States had adequately alleged an impairment of its ability to ensure compliance with its treaty obligations, the United States had standing to appeal. See Pet. App. 7a-8a. But in deciding the *merits* of the government's appeal, the court—giving appropriate weight to the views of the Executive Branch—construed the relevant treaty provisions and held that Mugabe and Mudenge were entitled to the personal inviolability and diplomatic immunity conferred upon diplomatic envoys by Articles 29 and 31 of the Vienna Convention. See Pet. App. 13a-20a, 23a-28a. That mode of analysis was entirely appropriate. In any event, the court of appeals' ultimate resolution of the case clearly would have been the same if the court had treated an *actual* treaty violation as a prerequisite to the government's appellate standing.

b. Article II, Section 3 of the Constitution assigns to the President the power to "receive Ambassadors and other public Ministers." That power encompasses the authority "to dictate the terms upon which foreign diplomats are received in this country." Pet. App. 9a. As the court of appeals correctly held, the United States has a judicially cognizable interest, sufficient to confer standing on appeal, in "guarding its authority to set the terms upon which foreign ambassadors are received." *Id.* at 11a; see Vienna Convention art. 29, 23 U.S.T. at 3240, 500 U.N.T.S. at 110 ("The person of a diplomatic agent

shall be inviolable. * * * The receiving state * * * shall take all appropriate steps to prevent any attack on [the diplomatic agent's] person, freedom or dignity.").

Petitioners' reliance (Pet. 14-16) on *Raines* v. *Byrd*, 521 U.S. 811 (1997), is misplaced. In *Raines*, this Court held that six individual members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act, 2 U.S.C. 691 *et seq.*, because the plaintiffs "alleged no injury to themselves as individuals [and] the institutional injury they allege[d] [wa]s wholly abstract and widely dispersed." 521 U.S. at 829. As the court of appeals correctly held, *Raines* "is distinguishable in crucial respects from the instant case." Pet. App. 10a.

Most significantly, *Raines* involved a purely intragovernmental dispute in which all parties to the case were members of either the Legislative or Executive Branch. This Court emphasized that Article III courts have historically declined to intercede in disputes between the political Branches. See *Raines*, 521 U.S. at 826-829. Here, by contrast, a live controversy exists between the United States and petitioners themselves, who are private parties rather than federal officials.

In *Raines*, moreover, the plaintiffs alleged only that the Line Item Veto Act would cause an "abstract dilution of institutional legislative power" (521 U.S. at 826) with respect to hypothetical *future* enactments. See *id.* at 825-826. In the instant case, the United States alleged and demonstrated a concrete impairment of the President's ability to ensure compliance with specific treaty obligations and to define the terms on which particular foreign envoys will be received. Finally, the Court in *Raines* "attach[ed] some importance to the fact that [the plaintiffs] ha[d] not been authorized to repre-

sent their respective Houses of Congress in this action, and indeed both Houses actively oppose[d] their suit." *Id.* at 829. The briefs filed on behalf of the United States in this case, by contrast, represent the position of the Executive Branch as a whole.[4]

2. On the merits, the court of appeals held that, under Section 11(g) of the U.N. Convention, Mugabe and Mudenge were entitled to the protections afforded to diplomatic envoys under Articles 29 and 31 of the Vienna Convention. See Pet. App. 12a-22a, 23a-28a. Petitioners contend (Pet. 19-24) that the court of appeals' holding is inconsistent with the text of Section 11 of the U.N. Convention. That argument lacks merit.

a. Petitioners' argument is based on the fact that the "immunity from legal process of every kind" provided by Section 11(a) of the U.N. Convention applies "in respect of words spoken or written and all acts done by [temporary representatives to the United Nations] in their capacity as representatives." U.N. Convention art. IV, § 11(a), 21 U.S.T. at 1426, 1 U.N.T.S. at 20. That immunity is inapplicable here because the wrongs alleged in petitioners' complaint do not involve acts performed by Mugabe and Mudenge "in their capacity as representatives." As the court of appeals recognized (Pet. App. 13a), however, Section 11(a) of the U.N. Con-

[4] The court of appeals' determination that the United States had standing to appeal was premised solely upon "the Government's interests in (1) ensuring that the United States does not violate its treaty obligations, and (2) guarding its authority to set the terms upon which foreign ambassadors are received." Pet. App. 11a. Contrary to petitioner's suggestion (see Pet. 15), the court did not purport to define the circumstances under which the Executive or Legislative Branch could intervene in a pending lawsuit to appeal a lower court's construction of a federal statute, and its decision has no necessary implications for such hypothetical proceedings.

vention is not the exclusive source of immunity for temporary representatives to the United Nations. In addition, Section 11(g) of the same Convention vests temporary representatives with "such other privileges, immunities and facilities not inconsistent with [Section 11(a)-(f)] as diplomatic envoys enjoy." U.N. Convention art. IV, § 11(g), 21 U.S.T. at 1428, 1 U.N.T.S. at 22.

Among the privileges and immunities that "diplomatic envoys enjoy" are the personal inviolability and immunity from legal process that are guaranteed by Articles 29 and 31 of the Vienna Convention. The court of appeals correctly held that those protections are "not inconsistent with" Section 11(a)-(f) of the U.N. Convention and are therefore available to United Nations envoys pursuant to Section 11(g). Pet. App. 13a-19a. Petitioners cite no decision that has construed the relevant treaty provisions in a different manner.

b. Petitioners contend (Pet. 22) that the court of appeals' decision "nullifies the limitations set forth in Section 11(a) [of the U.N. Convention], rendering that subsection completely superfluous and meaningless." Petitioners' argument ignores the fact that the scope of immunity afforded to diplomatic envoys, either pursuant to treaty or as a matter of customary international law and practice, is potentially subject to change over time. Section 11(a) of the U.N. Convention ensures that temporary representatives to the United Nations will always receive at least a specified minimum level of protection, without regard to the extent of the immunities that are available to diplomatic envoys at a particular point in time. Section 11(a) therefore is not superfluous, even assuming that the immunities it confers are currently embraced within the broader protections afforded by the Vienna Convention.

c. In construing "difficult or ambiguous" treaty language, a court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 700 (1988) (quoting *Air France* v. *Saks*, 470 U.S. 392, 396 (1985)). Because the Executive Branch is charged by the Constitution with negotiating and implementing international agreements, its interpretation of disputed treaty provisions is "given great weight." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). And because no treaty becomes effective until approved by the Senate, evidence as to the Senate's understanding of treaty language is also relevant to a court's interpretation. *United States* v. *Stuart*, 489 U.S. 353, 367-368 & n.7 (1989).

During the Senate's consideration of the U.N. Convention, the State Department Legal Adviser expressed the Executive Branch's understanding that, under the Convention, "nonresident representatives [to the United Nations] would * * * receive full diplomatic privileges and immunities." Pet. App. 17a (quoting S. Exec. Rep. No. 17, 91st Cong., 2d Sess. 12 (1970)). The report prepared by the Senate Committee on Foreign Relations stated the same view. See S. Exec. Rep. No. 17, *supra*, at 3 ("Under the [U.N. Convention], these nonresident representatives will also be entitled to full diplomatic immunities."). In addition, a 1976 opinion of the United Nations Secretary General confirmed that "Section 11 of the Convention in fact confers * * * diplomatic privileges and immunities on" temporary representatives. 1976 U.N. Jurid. Y.B. 227, U.N. Doc. ST/LEG/SER.C/14 (quoted at Pet. App. 18a-19a). Those materials amply support the court of appeals' conclusion that "[S]ection

11(g) extends to temporary U.N. representatives like Mugabe and Mudenge the full range of immunity from legal process afforded by Article 31 of the Vienna Convention," Pet. App. 19a, as well as the personal inviolability protected by Article 29, see *id.* at 23a-24a.[5]

3. Petitioners contend (Pet. 26-29) that, even if Mugabe and Mudenge were entitled to the protections accorded diplomatic envoys under the Vienna Convention, they could still be treated as involuntary agents for service of process on ZANU-PF. That argument lacks merit.

a. As this Court recognized nearly 200 years ago, "a consent to receive [a foreign minister], implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." *The Schooner Exchange* v. *McFadden*, 11 U.S. (7 Cranch.) 116, 139 (1812). In addition to impugning the dignity of both the foreign envoy

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[5] Relying on *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982), petitioners contend that courts may resort to evidence of the parties' shared understanding of a treaty "only if that shared interpretation flows from plain language in the treaty itself." Pet. 24. As the Court in *Sumitomo* recognized, the correct interpretation of a treaty provision will be *particularly* clear when extrinsic evidence of the signatories' understanding confirms the plain meaning of a treaty's text. See 457 U.S. at 185. The Court in *Sumitomo* did not suggest, however, that extrinsic materials may be consulted *only* for that purpose. To the contrary, this Court has consistently recognized that extrinsic evidence may properly be considered when a court construes an ambiguous treaty provision. See, *e.g.*, *Schlunk*, 486 U.S. at 700; see also Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 32, 1155 U.N.T.S. 331, 340 (explaining that "the preparatory work of [a] treaty and the circumstances of its conclusion" may be considered when application of other interpretive principles "[l]eaves the meaning ambiguous or obscure").

and the government he represents, treatment of an envoy as an involuntary agent for service of process on an organization with which he is affiliated may impair the envoy's performance of his assigned functions. Service of process on Mugabe and Mudenge effectively required those officials to determine the significance of the documents and to inform others at ZANU-PF of the pendency of the suit, thus diverting Mugabe and Mudenge from their official duties. In addition, the ultimate effect of the district court's ruling on service of process was that an organization of which Mugabe and Mudenge are senior officers was subjected to a large default judgment that could not have been entered if the two officials had remained outside this country or had eluded process servers.[6]

In a variety of ways, deeming foreign envoys to be proper involuntary agents for service of process on private organizations could hinder diplomatic relations between the United States and other nations. Foreign envoys might be deterred from visiting this country. Foreign diplomats who enter the United States could feel pressured to sever their organizational ties or to limit their activities within this country while they are present.[7] And independent of any such concrete effect

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[6] Petitioners' reliance (Pet. 27) on *Henderson* v. *United States*, 517 U.S. 654 (1996), is misplaced. Although one important purpose of service of process is to give the defendant notice of a pending lawsuit, petitioners do not and cannot dispute that the district court's award of a default judgment against ZANU-PF depended upon the court's holding that Mugabe and Mudenge were properly treated as involuntary agents for service upon the organization.

[7] Mugabe and Mudenge were potential agents for service of process upon ZANU-PF only because of their status as officers of that political party. See Fed. R. Civ. P. 4(h)(1) (service upon a corporation or unin-

on an envoy's behavior, a United States court's condonation of an affront to the envoy's dignity may act as an irritant in our relations with the diplomat and the government he represents.

Use of foreign envoys as involuntary agents for service of process could also disrupt the conduct of this Nation's foreign policy by subjecting United States diplomats to like treatment abroad. As the court of appeals observed, "permitting service of process on foreign diplomats could be construed as a hostile act and, thus, could invite retaliatory practices in otherwise friendly countries." Pet. App. 27a-28a (citing *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 981 n.5 (D.C. Cir. 1965)); cf. *Wei Ye* v. *Jiang Zemin*, 383 F.3d 620, 629 (7th Cir. 2004) (holding that head-of-state immunity precluded use of a foreign head of state as an involuntary agent for service on a third party; court relied in part on the representation of the Executive Branch that "it would be a 'great offense if foreign states and their courts were to encourage process servers to hound our President when he is abroad to conduct important negotiations with his foreign counterparts'"), cert. denied, 544 U.S. 975 (2005). The court of appeals correctly declined to permit such risks.

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corporated association may be made "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process"); Pet. App. 189a (petitioners argued in the district court that ZANU-PF "was properly served with process through the personal service effectuated on Mugabe and Mudenge in their capacities as senior officers of the party"). Neither Mugabe and Mudenge, nor any other foreign diplomat having an affiliation with a private organization sufficient to render him a potential agent for service of process, could realistically be expected to be indifferent to the prospect of a default judgment against the organization.

b. In *Hellenic Lines*, the District of Columbia Circuit invoked the practical concerns described above in holding (before the enactment of the FSIA) that a Tunisian diplomat could not be used as an involuntary agent for service of process upon a foreign state. See 345 F.2d at 980-981 & n.5. Petitioners seek to distinguish *Hellenic Lines*, noting that the issue in that case "was whether a diplomat could be served as an agent *of a foreign government*, not as an agent of a private, non-immune entity like ZANU-PF." Pet. 28. As the court of appeals explained in the instant case, however, "[n]othing in the D.C. Circuit's reasoning turned on the identity of the defendant." Pet. App. 28a. Rather, the crucial holding of *Hellenic Lines* is that service of process upon a foreign diplomat as agent of another entity may prove disruptive even though the diplomat himself is not being haled into court.

Because "the practical consequences of allowing service of process upon diplomatic agents * * * are equally likely to follow whether the diplomat (or the U.N. representative enjoying diplomatic immunity) is served as an agent for a private entity or as an agent for a foreign government," Pet. App. 28a; see pp. 16-17 & note 7, *supra*, the rationale of *Hellenic Lines* is fully applicable here. The court of appeals' application of *Hellenic Lines* to the present context is especially appropriate in light of the Executive Branch's judgment that use of a foreign envoy as an involuntary agent for service on a private organization would fully implicate the concerns described in that case. Cf. *Wei Ye*, 383 F.3d at 630 (deferring to Executive Branch determination that service of process on a foreign head of state "in order to reach an intended co-defendant in the same suit could frustrate this Nation's diplomatic objectives"). In any event, peti-

tioners identify no decision that has drawn the distinction they advocate or that has approved the use of foreign diplomats as involuntary agents for service of process on private organizations. Absent a conflict in authority, the question presented does not warrant this Court's review.[8]

4. Even if review by this Court were otherwise warranted to clarify the scope of protections accorded to temporary representatives under Section 11(g) of the U.N. Convention, this case would not be an appropriate vehicle for construing that treaty. Independent of the protections to which they were entitled as temporary representatives to the United Nations, Mugabe and Mudenge were immune from all forms of legal process by virtue of the Executive Branch's assertion of head-of-state immunity.[9]

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[8] Petitioners suggest (Pet. 28) that the resolution of the service-of-process issue may be affected by the fact that the underlying claims arise under 28 U.S.C. 1350 and the TVPA. Petitioners identify no provision of either statute, however, that bears on the question presented here. And while the TVPA's legislative history contains expressions of Executive Branch concern that the statute might exacerbate international tensions (see Pet. 28 n.16), there is no basis for inferring that Congress intended to supersede all existing mechanisms for safeguarding international comity. To the contrary, the relevant House Report specifically states that "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity." H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 5 (1992).

[9] The assertion of head-of-state immunity on behalf of Foreign Minister Mudenge is consistent with international practice. See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 3, 20-21 (drawing parallel in terms of immunity and inviolability between "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs"); *id.* at 22 ("[T]he functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her

As required by separation-of-powers principles, courts have consistently accepted Executive Branch assertions of head-of-state immunity. See note 1, *supra*. An assertion of immunity made by the Executive Branch on behalf of a foreign head of state is a political decision not subject to review by the courts. "[I]n the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. * * * [F]lexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive rather than by judicial decision." *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988); accord, *e.g.*, *Wei Ye*, 383 F.3d at 628-630 (court deferred to the Executive Branch's assertion of head-of-state immunity on behalf of China's President, and to its determination that the immunity encompassed protection from service of process as agent for another entity); *Spacil* v. *Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive.").

Here, the Executive Branch asserted head-of-state immunity on behalf of Mugabe and Mudenge and in-

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office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."). That is particularly evident in light of the fact that Mudenge was part of Mugabe's entourage at the relevant time. See 1 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 817 (2d rev. ed. 1945) ("As a matter of practice, the head of a foreign State, who enters the territory of any other, enjoys, together with his personal suite, exemption from local jurisdiction.").

formed the district court that the immunity extended to all forms of legal process. C.A. App. 327, 336. That assertion was binding on the court. Thus, even if Mugabe and Mudenge did not enjoy diplomatic immunity and personal inviolability under the U.N. Convention, the district court was required to dismiss the claims against them on the ground of head-of-state immunity, and to dismiss the claims against ZANU-PF for lack of proper service. Accordingly, this case does not present an appropriate vehicle for considering the scope of immunity afforded to temporary representatives under the U.N. Convention.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, EFRIDAH PFEBVE, ON HER OWN BEHALF AND ON BEHALF OF HER LATE BROTHER METTHEW PFEBVE, ELLIOT PFEBVE, ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHER METTHEW PFEBVE, EVELYN MASAITI, ON HER OWN BEHALF, MARIA DEL CARMEN STEVENS, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND DAVID YENDALL STEVENS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

No. 05-879

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, EFRIDAH PFEBVE, ON HER OWN BEHALF AND ON BEHALF OF HER LATE BROTHER METTHEW PFEBVE, ELLIOT PFEBVE, ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHER METTHEW PFEBVE, EVELYN MASAITI, ON HER OWN BEHALF, MARIA DEL CARMEN STEVENS, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND DAVID YENDALL STEVENS,

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REPLY BRIEF FOR PETITIONERS

1. The Government fails to address the central issue raised in the petition for certiorari: Whether the Government has standing to appeal for the sole purpose of challenging a district court's ruling on a procedural issue that does not bind the Government and where the only party bound by the court's ruling opts not to appeal. *See* Pet. i. Nor does the Government address this Court's recent expression of

" 'grave doubts' " about whether any party may appeal a judgment that is not binding on it. App. 7a (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66 (1997)). The Government's silence is understandable, for there is not a single case—until this one—recognizing appellate standing in circumstances like these.

Having waived its response on the actual question presented, the Government instead advances the extraordinary argument that it has appellate standing to intervene whenever a lower court adopts an allegedly erroneous interpretation of a treaty or constitutional provision. In other words, the Government's view is that it can intervene, appeal, and seek correction of a purportedly erroneous ruling whenever a court disagrees with the Executive Branch's views regarding treaty law or the Constitution, all without regard to whether the Executive is bound by the ruling. This position has no support in this Court's precedent or even in any lower court precedent. What is more, both of the interests identified by the Second Circuit as being sufficient to confer appellate standing contradict this Court's precedent.

a. Relying exclusively on cases involving private party conduct that allegedly violated an international treaty, the Government maintains that its "interest in ensuring compliance with the United States' treaty obligations is * * * sufficient to confer standing to appeal." Opp. 9-10. The Government misses the point. Petitioners never disputed that the Government would have standing to intervene in a case (either in the district court or the court of appeals) to stop a private party from *violating* a treaty; the Executive Branch's constitutional authority to enforce treaties obviously includes violations by private parties. But that is not this case. Here, the Second Circuit permitted the Government to intervene merely because the Government disagreed with the District Court's *interpretation* of a treaty. *See* App. 7a ("the Government argues that the district court's decision interferes with its obligation to ensure that the United States complies

with the Vienna Convention on Diplomatic Relations"). By prioritizing the Executive Branch's preferred interpretation over the Judiciary's, the Second Circuit dispatched with the established rule that it is the responsibility of the federal courts to interpret and apply federal law—including treaties. *See* Pet. 13.[1]

The Government attempts to downplay the critical difference between the cases it cites (involving potential treaty violations by private parties) and this case (involving a mere interpretion disagreement with the judiciary). But there is no principle of treaty or constitutional law that allows the Executive Branch to step into the shoes of a private party and request an advisory opinion on appeal just because the Executive thinks that an inferior court misinterpreted the law. The Government would clearly lack authority to appeal a district court decision involving a private dispute that implicates federal law simply because the Government disagrees with the court's reasoning. This same principle holds fast when the federal law at issue is a treaty.

b. The Government cannot identify a single case recognizing appellate standing based on the notion that a district court decision "usurped" the Executive Branch's constitutional authority. Pet. 14-15. Lacking any affirmative support for its position, the Government—like the Second Circuit—resorts to trying to distinguish this case from *Raines* v. *Byrd*, 521 U.S. 811 (1997). The Government's distinctions fail.

The Government's primary argument is that "*Raines* involved a purely intra-governmental dispute," whereas

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[1] Indeed, this Court has often rejected the Executive's interpretation of a treaty. *See* Pet. 13 (citing *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134-135 (1989); *Perkins* v. *Elg*, 307 U.S. 325, 337-342 (1939); *Johnson* v. *Browne*, 205 U.S. 309, 319-321 (1907)); *see also* U.S. Const., art. III, § 2, cl.1 ("The judicial Power shall extend to all Cases * * * arising under * * * Treaties.").

petitioners here "are private parties rather than federal officials." Opp. 11. Of course, the Government has never once alleged that petitioners' own conduct somehow "usurped" the Executive Branch's constitutional authority. Rather, the only theory ever advanced by the Government in this case is that the District Court usurped the Executive's authority and caused a cognizable injury by rejecting the Executive's preferred interpretation of treaties. In other words, the Government itself has consistently treated this case as an intra-branch dispute—precisely like *Raines*.

The Government also attempts to distinguish *Raines* as involving only the "abstract dilution" of legislative power resulting from "hypothetical future enactments." Opp. 11. But the same is true here. The Government has never explained how the District Court's decision burdens its legal rights, much less what concrete, immediate injuries were caused it by the District Court's interpretation. Nor can the Government distinguish *Raines* on the ground that the suit in that case had not been authorized by Congress. Opp. 11-12. The Government already conceded in the District Court that 28 U.S.C. § 517, the statute that authorized it to submit "suggestions" as a "non-party" to the trial court, "does not on its face permit the United States to initiate proceedings in a court where no proceedings are pending." *See* Letter to Hon. Victor Marrero from Assistant United States Attorney David Jones (Dec. 18, 2001). *Raines* directly applies and should have dictated the outcome in this case; yet the Second Circuit reached the opposite conclusion.[2]

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[2] The Government does not contest that its theory would have allowed it to appeal even if the plaintiffs had lost on the merits of their claims and chosen not to appeal because the alleged injury stemmed from the service of process ruling. *See* Pet. 19. Such intervention in private litigation solely to appeal procedural rulings that are not binding on the Government when neither of the private parties chooses to appeal seeks nothing more than an advisory

c. The Government's sole remaining interest is in overturning unfavorable precedent. *See* Pet. 16-19. Under *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632, 633-634 (1944), however, an intervenor lacks standing to pursue an independent appeal when its sole interest in the case is its disagreement with the lower court's interpretation of a legal issue. The Government candidly admitted in the District Court that its " 'sole[]' " interest in this case was to protect its " 'conduct of international relations from harms that would result from any erosion of immunities afforded visiting foreign heads of state and diplomats' " as a result of the District Court's ruling. Pet. 18 (quoting U.S. Gov't Mem. in Supp. Reconsideration (Nov. 16, 2001)). The Government's intervention therefore falls quite clearly under the rule of *Boston Tow*; yet the Second Circuit ignored that controlling precedent as well.

2. The petition presents another important and recurring issue of national consequence as well as a fundamental question of international law: Whether a temporary representative to the United Nations is immune from service of process when that process seeks jurisdiction over an otherwise non-immune private entity of which the representative is an official. The Second Circuit's unwarranted expansion of immunity ignores this Court's clear dictates that a court must follow the clear and unambiguous language of a treaty. *See* Pet. 13 n.7, 19-20 (citing cases standing for this proposition). And the Second Circuit's holding has grave implications for victims of torture seeking redress under the Torture Victims Protection Act and the Alien Tort Statute. The decision allows temporary U.N. representatives to solicit, directly and on American soil, funding and support for a private entity responsible for multiple acts of torture. The

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opinion. No authority sanctions advisory opinions merely because a case involves foreign relations or treaty interpretation.

result: two statutes previously of great use in bringing redress to torture victims rendered essentially toothless.[3]

The Second Circuit's ill-considered expansion of diplomatic immunity has profound precedential impact because the United Nations is headquartered in that circuit. Because of this geographical fact, there is little possibility of a circuit split on the fundamental question of international law at issue here; other federal courts of appeals are unlikely ever to encounter this issue. Even without a circuit split, moreover, this question is vital to interpreting the scope of immunity for visiting United Nations representatives.

a. " 'The object of [this Court] granting writs of certiorari on points of statutory or treaty interpretation is to determine the correctness of fundamental points that lower courts have resolved * * *.' " Pet. 26 (quoting *Chan*, 490 U.S. at 134-135). No one disputes that Section 11(a) of the U.N. Convention on Privileges and Immunities ("U.N. Convention") does not protect Mugabe or Mudenge from suit in this case. Section 11(a) specifically limits a temporary U.N. representative's immunity from legal process to acts "done by them in their capacity as representatives." Section 11(a)'s prefatory language similarly explains that temporary representatives enjoy immunity only "while exercising their functions[4] and

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[3] A 2004 study by the International Human Rights Law Clinic at the University of Berkeley Boalt Hall School of Law reveals that of the approximately 99 ATS cases decided over the last 30 years, 2 were decided in the 1970s, 15 were decided in the 1980s, 35 were decided in the 1990's, and 47 were decided from 2000 to 2004. *See* Alien Tort Claims Act Case Compendium, Int'l Human Rights Law Clinic, University of Berkeley Boalt Hall School of Law (Mar. 2004), *available at* http://www.law.berkeley.edu/clinics/ihrlc/pdf/ACTA.pdf.

[4] The decision below conflicts with the established rules of treaty interpretation by equating the prefatory language of Section 11—"while exercising their functions"—with the far broader

during their journey to and from the place of meeting." U.N. Convention, art. IV, § 11. *See* App. 13a; Pet. 21-22; Opp. 12. The Second Circuit should have hewed to the treaty's clear and unambiguous language. But instead it accomplished through Section 11(g)'s generic catch-all provision what was *specifically* foreclosed by Section 11(a).

b. The Government does not (for it cannot) dispute the legion of cases requiring a court to follow the clear and unambiguous language of a treaty. *See* Pet. 13 n.7, 19-20 (citing cases). Yet the Government still defends the Second Circuit's interpretation of the U.N. Convention. Its arguments are meritless.

The Government first argues that the U.N. Convention is "ambiguous" and therefore the Second Circuit's resort to extrinsic evidence was proper. *See* Opp. 14, 15 n.5. Wrong; there is nothing ambiguous in the least about Section 11(a)'s limited immunity grant. The Government next makes the never-before raised argument—unsupported by any authority—that Section 11(g) does not render Section 11(a) meaningless because "the scope of immunity afforded to diplomatic envoys * * * is potentially subject to change over time." Opp. 13. Because the scope of immunity may change, the Government's argument goes, Section 11(a) ensures that temporary representatives will always receive a minimum level of protection without regard to the immunities available to diplomatic envoys at a particular point in time. *Id.* But Section 11(a) is not some dormant failsafe, to be invoked only in the event of some hypothetical future change in the scope of diplomatic immunity. It is the polestar for determining immunity from legal process under the U.N. Convention. And Section 11(g), for its part, encompasses only those Vienna Convention protections that are "not inconsistent" with other parts of Section 11. Incorporat-

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phrase "during the entire period of presence in the State * * * for reasons of the conference in question." App. 19a; Pet. 24 n.15.

ing the Vienna Convention's broader protections from legal process is plainly inconsistent with Section 11(a)'s more limited scope.

c. Nowhere in its opposition does the Government squarely take issue with Petitioner's argument that the Second Circuit's holding effectively grants immunity to an otherwise non-immune private entity. *See* Pet. 29. Instead, the Government apparently accepts that unacceptable consequence as an inevitable result of its position regarding inviolability. *See* Opp. 15-17. The Government views service of process, which serves a notice function for a non-immune private entity in this case, as *always* precluded by inviolability. By sweeping service of process for a third party into its inviolability analysis, the court below drastically disrupted this Court's view of service of process.[5] *See* Pet. 27 (citing *Henderson* v. *United States*, 517 U.S. 654, 671-672 (1996) (setting forth this Court's understanding that "the core function of service is to supply notice of pendency of a legal action")). And the U.N. Convention itself belies the Government's position by specifying that the immunities afforded to representatives are "not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of *their functions in connection with the United Nations.*" U.N. Convention, art. IV, § 14 (emphasis added). The ZANU-PF private political rally attended by Mugabe quite plainly was not "in connection with the United Nations." A contrary interpretation strains the meaning of that phrase beyond its natural import.

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[5] *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 981 (D.C. Cir. 1965), on which the Government heavily relies, involved a libel in personam claim, not a claim under the TVPA or the ATS. Indeed, the Government's position in this case and its extensive reliance on *Hellenic*, *see* Opp. 18-19, is precisely the position that the State Department presented to Congress—and that Congress rejected in enacting the TVPA.

* * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF THE *AMICUS CURIAE*

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It seeks to promote human rights and the rule of law internationally. It sends trial observers and human rights monitors to many parts of the world and publishes reports on its findings. BHRC has an interest in the development of legal standards and remedies designed to address egregious violations of internationally recognized human rights, such as those at issue in the present case. This Court has stated that it values the views of respected professional organizations and nations that share the Anglo-American legal heritage. See *Thompson* v. *Oklahoma*, 487 U.S. 815, 830 (1988). Hence, BHRC respectfully submits this brief.[1]

This case raises two issues of particular concern to BHRC: human rights abuses in Africa, and the dangers of overreaching Executive authority in democratically elected governments. With regard to the former, members of BHRC have observed trials in Nigeria, Kenya, and Tunisia, and served as human rights observers in Sierra Leone. BHRC has followed with great concern the developing human rights crisis in Zimbabwe and has condemned the ruling party's use of intimidation, delay, and biased judicial appointments to subvert the legal culture for political ends.[2]

Although standing is usually a question of domestic law, in the present case, the issue is inextricably tied to larger

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[1] Pursuant to Rule 37.6, BHRC certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than BHRC, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] ANNUAL REPORT 2004, BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES 6, *available at* http://tinyurl.com/7ahc9.

questions of human rights threatened by eroding judicial independence and expanding Executive Branch power. Therefore, the Second Circuit's holding that the U.S. Government has standing to appeal, even when the defendant ruling party of Zimbabwe did not enter an appearance, serves to widen the reach of the Executive without constitutional foundation, in a way that places human rights protections in jeopardy. Accordingly, BHRC submits this brief to urge this Court to grant the petition for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

> The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.[3]

Despite the well-founded "doubt" that Justice Jackson expressed in this quotation, the Executive Branch has recently attempted to expand its powers significantly beyond the limits that the Framers envisioned, at the expense of human rights. The decision below is just one example, though a tragic one. It sanctions the Government's attempt to control litigation in which it has no direct interest. The effect of the decision is to enable the Federal Government to shield a foreign governing political party that abuses its own country's citizens. As justification, the Second Circuit relies on the Executive's inherent constitutional power: upholding the district court's judgment in favor of the terror victims would "usurp[]" the Executive's foreign affairs power and "interfere[]" with its power to receive diplomats. Pet. App. 7a. These harms, the appeals court held, are concrete enough to

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[3] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

give the Federal Government constitutional standing to appeal.

But in fact the Government has suffered no harm—and therefore has no standing—because the Constitution simply does not recognize the sort of expansive power that the Executive Branch claims. The Government contends that courts "are *bound* by Executive Branch suggestions" concerning foreign affairs and the interpretation of treaties, and must therefore "defer *completely*."[4] This Court should intervene to limit the damaging consequences of such expansive reasoning. One of the fundamental principles of separation of powers is that "[i]t is emphatically the province and duty of the *judicial department* to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). Thus, in one case after another, this Court has emphasized that it is the responsibility of the *courts* to interpret treaties. It follows that the Executive Branch's claimed injury—that the Judiciary, by interpreting a treaty, is interfering with the Executive's ability to conduct foreign affairs—lacks a constitutional basis, and therefore cannot support Government standing.

The Government's alternative standing argument in the Second Circuit unduly minimizes not only the Judiciary's constitutional role, but also the Legislature's. According to the Government, courts may not "usurp[] the Executive's Article II authority over foreign affairs." U.S. 2d Cir. Br. 16. This argument necessarily implies that general "authority over foreign affairs" belongs exclusively to the Executive to begin with. This is too strong a claim. Rather, like so many functions in the United States government, the Constitution splits foreign relations responsibilities among the branches.

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[4] Brief for United States of America, Intervenor-Appellant-Cross-Appellee, at 14, 16, *Tachiona et al.* v. *Mugabe*, No. 03-6033(L) (2d Cir. Sept. 29, 2005), *available at* 2003 WL 24174513 (emphasis added) [hereinafter "U.S. 2d Cir. Brief"].

And one of the foreign affairs powers that *Congress* has "*without exception*" is "plenary power to make rules for the admission of aliens." *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) (internal citation and quotation omitted) (emphasis added). Meaning, not only does the Executive Branch have no exclusive power over foreign affairs to be usurped, but in fact *Congress* has authority over the issue at the core of the Government's case: the rules governing the entrance of foreigners—including diplomats—to this country.

Against this background, the Government argued, and the Second Circuit accepted, a claim that the Executive Branch has "exclusive authority to set the terms upon which the United States receives foreign ambassadors." Pet. App. 7a. But as Alexander Hamilton explained in *The Federalist Papers*, this specific power is ceremonial, and "*will be without consequence in the administration of the government.*"[5] Therefore, this power also cannot serve as a foundation for the Government's alleged standing.

Further, the legal theories that the Executive Branch has put forward to justify its alleged standing in this case are precisely the ones that it has tried to use to justify overextending its power in a series of constitutionally suspect activities. Specifically:

- The now discredited so-called "Torture Memo" interpreted the Geneva Convention Against Torture, and its implementing statutes, to allow abuse up to the point of "organ failure, impairment of bodily function, or even death." The Department of Justice wrote in the memo that "[t]he Executive's interpretation is to be accorded the greatest weight in ascertaining a

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[5] THE FEDERALIST, No. 69, at 352 (Garry Wills ed., 1982) (emphasis added).

treaty's intent and meaning."[6] That is virtually identical to the Government's claim in the case at hand: that its interpretation of treaties is binding.

- In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), this Court rejected the Government's claims that the Executive Branch had unreviewable power to lock up an American citizen. Though this Court in *Hamdi* firmly rejected the Administration's assertion of exclusive power, the Government's arguments in this case are very similar to the ones it made there.

- In its recent memorandum attempting to justify the Government's newly disclosed program of intercepting communications of its citizens without congressional authorization, the Department of Justice wrote that "even in peacetime, the president has *inherent* constitutional authority * * * to conduct searches for foreign intelligence purposes."[7] That is, the Executive is relying on the same exaggerated authority over foreign affairs to justify surveillance of U.S. citizens that it is relying on here to justify its alleged standing.

In justifying these activities the Government relies on arguments very similar to those it advances in this case. This is not a surprise, as each results from specific policies that the Department of Justice has adopted with the precise goal of

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[6] Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, on "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A," at 1, 16 (Aug. 1, 2002), *available at* http://tinyurl.com/dsvnw [hereinafter "Torture Memo"].

[7] Memorandum from U.S. Dep't of Justice, on "Legal Authorities Supporting the Activities of the National Security Agency Described the President," at 6, 8 (Jan. 19, 2006), *available at* http://tinyurl.com/e2528 (emphasis added) [hereinafter "Surveillance Memo"].

expanding Executive Branch power. Significantly, this Court will not commit itself to any decision regarding any of those activities by reviewing this case, given factors present there are not present here. But the converse does not hold—if this Court allows the Second Circuit's opinion to stand, it will have tacitly taken a step towards legitimizing the Government's reasoning in other related circumstances.

This Court should intervene here, in order to protect the separation of powers that has served this nation so well since it declared independence.

ARGUMENT

I. The Government Had No Standing To Appeal Because The Constitution Does Not Exclusively Grant It The Powers It Claims The District Court "Usurped."

The underlying facts of the present case demonstrate that the district court's opinion does not in any way either usurp or threaten the Executive's foreign affairs policy regarding Zimbabwe. The United States Government has been trenchant and forthright in its criticisms of the sort of human rights violations, committed by the defendant political party, which are the subject of this litigation.[8] The Government is rightly outraged by such violations. It makes little sense for the Government to condemn as usurpation or interference the district court's opinion, which enables victims to obtain redress for the very violations of human rights which the Government has condemned.

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[8] See, *e.g.*, U.S. DEP'T OF STATE., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Released by Bureau of Democracy, Human Rights, and Labor, Feb. 28, 2005), *available at* http://tinyurl.com/fcl4k; Exec. Order No. 13,391, 70 Fed. Reg. 71,201 (Nov. 22, 2005); Exec. Order No. 13,288, 68 Fed. Reg. 11,457 (Mar. 10, 2003).

But on appeal of that district court opinion, the Second Circuit accepted the Government's argument that it has standing to appeal this case because (1) "the district court's decision interferes with its obligation to ensure that the United States complies with the Vienna Convention on Diplomatic Relations," and (2) "the district court's decision upholding service of process on Mugabe and Mudenge as agents for ZANU-PF usurped the executive branch's constitutional authority to conduct foreign affairs and to send and receive ambassadors." Pet. App. 7a–8a.[9]

It is respectfully submitted that the appeals court wrongly accepted the implications of the Government's arguments, namely, that the Constitution exclusively vests foreign affairs powers in the Executive Branch, and that the power to receive ambassadors is substantive. That is, the Constitution does not clearly support the existence of the expansive powers that the Executive claims. Absent the constitutional harms that it alleges, the Government has no standing in this case.

A. Courts, Not The Executive, Have The Final Say Under The Constitution In Interpreting Treaties.

Regarding the first ground for Government standing, the Second Circuit held that "[a] corollary to the executive's power to enter into treaties is its obligation to ensure that the United States complies with them." Pet. App. 7a. The court thus determined that the Government's mere *allegations* that "the district court's interpretation * * * plac[es] the United States in breach of its international obligations * * *" was a sufficient claim of injury to support standing. *Ibid.* Put another way, the lower court held that the Executive Branch

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[9] Mugabe is defendant Robert Gabriel Mugabe; Mudenge is defendant Stan Mudenge; and the ZANU-PF is defendant Zimbabwe African National Union-Patriotic Front. As petitioner explains in greater detail (at Pet. 4–5), Mugabe and Mudenge were both served on behalf of the ZANU-PF, in which they are officers.

can assert a sufficient injury to gain standing to intervene and appeal merely by *asserting* that the district court's interpretation of a treaty is incorrect.

This reasoning is circular: it allows the Executive Branch to assume the answer to the very question at issue—whether a treaty has been violated—in order to secure standing. By this logic, unless this Court acts, the Government will have free reign to intervene—and even appeal against the wishes of the parties—in *each and every case* that the Government asserts in any way involves an international treaty.

Even worse, this reasoning would deprive the Judiciary of its core constitutional authority. As Chief Justice Marshall wrote in the foundational opinion establishing judicial independence in the American constitutional system, "[i]t is emphatically the province and duty of the *judicial department* to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177 (emphasis added). To eliminate any doubt that this judicial responsibility "to say what the law is" extends to the realm of agreements between nations, this Court has repeatedly held, in opinions dating back to the first days of the nation, that *courts* have the responsibility to interpret treaties. See, *e.g.*, *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 239 (1796) ("the courts, in which the cases arose, were the only proper authority to decide, whether the case was within this article of the treaty, and the operation and effect of it"); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature * * *."); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961) ("courts interpret treaties for themselves"); *Japan Whaling Ass'n* v. *Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treaties"). See also Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 946–947 & nn.325–332 (2004).

The Second Circuit did not give sufficient deference to this unbending line of cases. In the part of its opinion interpreting the relevant treaties on the merits, the Second Circuit correctly acknowledged that the Executive Branch's view of a treaty is "not conclusive." Pet. App. 15a (citation omitted). However, the court of appeals did not apply that same appropriate standard to the question of standing. Rather, it accepted as correct, for purposes of standing, the Executive Branch's assertion that the district court placed the nation in violation of a treaty.

In doing so, the Second Circuit wrongly assumed that what is in fact a judicial function—interpreting treaties—was an executive function. And without the constitutional power, the Executive Branch has no constitutional injury—and so no standing—on this ground.

B. Authority Over Foreign Affairs Is Not Solely The Executive's, But Is Split Under The Constitution Among The Three Branches Of Government.

The Second Circuit's second ground for granting standing to the Government rests on the claim that the district court had usurped the Executive's foreign affairs powers, and specifically its power to receive ambassadors.

To be sure, the Executive Branch has broad responsibilities in the realm of foreign affairs, especially in its ability to *conduct* foreign affairs. But foreign affairs involves more than conduct; accordingly, the Executive's overall foreign affairs powers are neither absolute nor exclusive. Rather, the Constitution parcels out various responsibilities relating to foreign relations between the three branches of government. Therefore, there is no basis for the Government to claim that the Executive's powers have been "usurped." While the Judiciary's and Congress's role in foreign affairs may be more limited than the Executive's, they are nonetheless vitally important to the constitutional scheme and must be protected.

The discussion above demonstrates that the Judiciary has the constitutional responsibility to interpret treaties. Even in the wider realm of foreign affairs, the Judiciary still retains authority. As this Court held in *Baker* v. *Carr*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. 186, 211 (1962). See also *Banco Nacional De Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1963) ("[i]t should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it").

Congress also has substantial foreign relations powers, both explicit and inherent. Most obviously, the Constitution provides that the Senate must ratify all treaties by a two-thirds vote for them to become law. U.S. CONST. art. II, § 2. But its authority is far broader than that. As Professor Tribe has written:

> Beyond the appropriations power, Article I, § 8 confers upon Congress a variety of ways in which it may control the structure of the devices and institutions available to the President in the conduct of foreign policy. Congress is empowered in Article I, § 8, to "lay and collect . . . Duties, Imposts and Excises"; to "regulate Commerce with Foreign Nations"; to "establish an uniform Rule of Naturalization"; to "define and punish . . . Felonies committed on the high seas, and Offences against the Law of Nations"; to "declare War"; to "raise and support Armies"; to "provide and maintain a Navy"; to "make Rules for the Government and Regulation of the land and naval Forces"; to "provide for calling forth the Militia to . . . repel Invasions"; and to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 642 (3d ed. 2000).

Congress' power goes further still. It has legislated on the sensitive area of immunity of foreign nations in United States courts, by passing the Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. §§ 1330 *et seq.*[10] Congress also has power in the specific area of the admission of foreigners to the United States. Far from being an executive power, this Court has repeatedly held that the national legislature has "*plenary* power" on this topic. See, *e.g.*, *Kleindienst*, 408 U.S. at 766 (citing *Boutilier* v. *INS*, 387 U.S. 118, 123 (1967) (Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens); *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547 (1895); *Galvan* v. *Press*, 347 U.S. 522 (1954)).

Critically, Congress' power over the admission of foreigners extends specifically to the admission of diplomats and ambassadors, such as the individual defendants in this case. Under the Immigration and Naturalization Act, Congress has expressly regulated the issuance of diplomatic visas. See 8 U.S.C. §§ 1101(a)(11), 1201(b).

Therefore, it should be clear that the Executive does not have exclusive control over foreign affairs, and that neither

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[10] Significantly, the FSIA also reaffirms the role of the Judiciary in foreign affairs, specifying that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States." 28 U.S.C. § 1602. See also *Republic of Austria* v. *Altman*, 541 U.S. 677, 691 (2004) (the FSIA codifies a theory that "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch").

Congress nor the courts can be said to "usurp[]," Pet. App. 7a, the Executive's power to conduct foreign affairs by exercising their own foreign affairs powers.

The Second Circuit also invoked Article II, section 3 of the Constitution. That provision states in part that the president "shall receive Ambassadors and other public Ministers." From those words, the appeals court concluded that the Executive Branch has "authority to set the terms upon which foreign ambassadors are received," Pet. App. 11a, and that the district court's decision "asserted adverse effects" on it, *ibid.*—an injury that justifies the Government's standing.

But the Constitution's Framers intended the power to receive ambassadors to be purely ceremonial, and *not* the basis for any substantive power. Alexander Hamilton states the point plainly in the *Federalist Papers*. As he explains,

> The President is also to be authorised to receive Ambassadors and other public Ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance, *which will be without consequence in the administration of government.*

FEDERALIST NO. 69, *supra*, at 352 (emphasis added).[11]

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[11] See also Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism And Foreign Affairs*, 102 MICH. L. REV. 545, 677 n.646 (2004) ("Hamilton suggested a narrow reading of the Ambassador Receipt Clause"). James Madison expressed similar sentiments on the minimal importance of this provision, referring explicitly to FEDERALIST NO. 69, and stating that "it would be highly improper to magnify the function into an important prerogative." VI THE WRITINGS OF JAMES MADISON 162 (G. Hunt ed. 1906). But see XV THE PAPERS OF ALEXANDER HAMILTON 41 (H. Syrett ed. 1969). To the extent that the clause functions as a basis for the president's power to recognize foreign nations, that aspect of the provision is not implicated by this case.

Given the intended limited nature of this power, the Second Circuit erred by relying on this authority as grounds for the government's standing to appeal. This is especially so in a case, such as this one, in which the Government was never even called upon to recognize any diplomat (as Mugabe and Mudenge traveled to the United States at the behest of the United Nations, not of the Government).

C. The Government Has Argued In This Case For An Overly Expansive Executive Power.

The Second Circuit's opinion was undoubtedly influenced by the Government's sweeping interpretation of Executive power. For example, one of the Government's briefs to the Second Circuit states that "courts have long recognized that they are *bound* by Executive Branch suggestions concerning head-of-state immunity. The district court's failure to *defer completely* to the Executive Branch[] * * * impermissibly interfered with and may well undermine the Executive's conduct of foreign relations." U.S. 2d Cir. Br. 14 (emphasis added). The Government's brief makes references elsewhere to the "complete" and "full" deference that the Executive claims it is due. Despite this absolutist language, the Government cites no legal authority that specifically states federal courts are "bound" by and must "fully" defer to the Executive in the realm of foreign affairs or treaty interpretation.

The district court, appropriately, did not agree with the Government's claims of executive authority. In his Decision and Order of Feb. 14, 2002, Judge Marrero called the Government's position "troubling." Pet. App. 113a. As he explained, "[i]mplicit in the Government's posture is * * * that upon being handed the Government's proffered reading of an international agreement, the Court is obliged, at the risk of

otherwise causing indignity and affront, to give binding effect to what the Government says the treaty means." *Ibid.*

The Second Circuit, however, accepted the Government's mere *assertion* that a treaty was being violated as proof of an actual treaty violation, and further accepted the Government's claim that this violation somehow was an injury sufficient to justify non-party standing. But this reasoning rests on the Government's false premise that the Executive Branch can bind the courts on matters of treaty interpretation, and force them to defer. The Second Circuit did not object to the Government's claims of such unreviewable power, but this Court should. For, as is next discussed, this case has even broader implications than may be apparent at first.

II. The Same Expansive View Of Executive Power That The Government Claims Here Has Been Used To Justify Other Troubling Actions.

It is not merely the case that the Government's expansive view of Executive power in the realm of foreign affairs is unsupported by the Constitution. Rather, the Government has developed its position over the last several years, as an intentional effort to strengthen the Executive Branch. This asserted amplification of executive powers should receive this Court's attention, because it comes at the expense of the other branches of government. Further, the very same legal arguments used as the basis for expanded Executive power in the case at hand have also been relied upon in several other troubling areas. Therefore, if this Court lets stand the Executive's arguments in the context of this case, it is tacitly permitting their use in these other contexts as well.

A. The "Torture Memo"

There is perhaps no better example of the consequences of the Government's arguments in the case at hand than the infamous "Torture Memo" that became public in 2004. In it,

the Government made a number of the same arguments that it makes here.

The Torture Memo concerned the interpretation of the Geneva Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, as well as the United States statutes that implement it (18 U.S.C. §§ 2340–2340A). The memo was written by the Department of Justice's Office of Legal Counsel for the White House. The memo takes an exceedingly narrow view of what counts as torture. Specifically, the Justice Department counseled:

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. * * * We conclude that the treaty's text prohibits only the most extreme acts by reserving criminal penalties solely for torture * * *.

Torture Memo at 1–2. The memo also addresses the power of the Executive Branch to interpret treaties. It uses language strikingly similar to the arguments made to the Second Circuit, and which the Second Circuit accepted, on the question of the Government's standing. Just as the Government argued before the Second Circuit that courts are bound by the Executive's interpretation, the Torture Memo states that "The Executive's interpretation is to be accorded *the greatest weight* in ascertaining a treaty's intent and meaning." *Id.* at 16 (emphasis added). If the Executive's interpretation has the "greatest weight," then the Judiciary's independent interpretation would by definition have less, if any, weight. This directly parallels the Government's claim here that the courts are "bound" by the Executive's treaty interpretation.

Similarly, the Government in the case at hand argued before the Second Circuit that it must "[f]ully" defer to the Executive (U.S. 2d Cir. Br. 16). The Torture Memo contains parallel advice. It advises the White House that "[i]n the area

of foreign affairs * * * the avoidance canon has special force." Torture Memo at 34. The "avoidance canon" it refers to is a rule of statutory construction the memo defines as: "statutes are to be construed in a manner that avoids constitutional difficulties." *Ibid.* But by giving "special force" to this canon in the realm of foreign affairs, the Torture Memo is essentially counseling that courts should go out of their way to avoid reading constitutional difficulties into Executive decisions. That is, the memo instructs that, in the area of foreign affairs, courts must go out of their way to let Executive decisions stand unperturbed. This is, in essence, the same argument that the Government made in this case, when it claimed that courts should "fully" defer to the Executive.

Finally, the Torture Memo relies on Section 1 of Article II of the Constitution, which states that "[t]he executive Power shall be vested in a President of the United States of America." According to the memo, "[t]hat sweeping grant vests in the President an unenumerated 'executive power' and contrasts with the specific enumeration of the powers * * * granted to Congress in Article I." *Id.* at 37. Similarly, in the case at hand, the Government wrote that the "provision[] vesting the 'executive Power' in the President * * * confer[s] on the President the authority to conduct foreign affairs." U.S. 2d Cir. Br. 17. The arguments are at core the same.[12]

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[12] For criticism of the sort of broad interpretation of the "Vesting Clause" that the Government asserts here, see, *e.g.*, Bradley & Flaherty, *supra*, 102 MICH. L. REV. at 551 (noting "the textual case for the Vesting Clause Thesis is at best uncertain" and "historical sources that are most relevant * * * contain almost nothing that supports the Vesting Clause Thesis, and much that contradicts it").

Although the Department of Justice in 2004 issued a new memorandum that supercedes the Torture Memo, see Memorandum from Daniel Levin, Acting Assistant Attorney General, to the Deputy Attorney General, on "Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A" (Dec. 30, 2004), *available at*

B. *Hamdi* v. *Rumsfeld*

The arguments that the Government made in the Second Circuit in this case also parallel those that this Court rejected in *Hamdi* v. *Rumsfeld*. Justice O'Connor, in her already much-cited opinion in *Hamdi*, noted that "we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. * * * [T]his approach serves only to *condense* power into a single branch of government." 542 U.S. at 535–536 (Opinion of O'Connor, J.). Justice Thomas, in his dissent, also recognized that the Constitution does not vest control over foreign affairs exclusively in the Executive Branch. As he wrote, "Congress, to be sure, has a substantial and essential role in both foreign affairs and national security." 542 U.S. at 582 (Thomas, J., dissenting).

Yet just as in *Hamdi* the Government claimed that the separation of powers doctrine insulated its decisions from judicial review, it claimed in this case that its powers are so expansive that the Judiciary must fully defer to them, and that any judicial treaty interpretation the Executive disagrees with causes a constitutional injury justifying standing. These parallel the arguments that this Court has already rejected.

C. Domestic Surveillance

Recently, the media revealed that the Government has been engaging in surveillance of "Americans and others inside the United States * * * without the court-approved warrants ordinarily required for domestic spying." James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. The Department

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http://tinyurl.com/djxr4, that second memo does not disavow the Executive's assertions of power; rather, it merely states that the assertions "have been eliminated from the analysis." The Government's arguments in the case at hand show that the Government has not yet abandoned them.

of Justice, in response, issued a public defense of its programs. The arguments that the Justice Department offers in its Surveillance Memo in support of the Government's eavesdropping programs are, again, in many respects, similar to the ones that it offered to the Second Circuit in this case: the President has "Inherent Constitutional Authority" to order surveillance without warrants. Surveillance Memo at 6, 7, 8. The "Canon of Constitutional Avoidance" means that the courts should not review the contested presidential decisions. *Id.* at 28, 31. The "Vesting Clause" grants the President "[t]he executive Power" to act unilaterally. *Id.* at 30. And the memo claims that the Executive's unilateral decision about constitutional limits ends the debate about whether the Executive has unilateral power. *Id.* at 34. The Government's arguments there and here are parallel.

D. The Arguments' Pedigree.

It is not a coincidence that the Government relied on the same legal arguments in these situations that it relied on in this case. Rather, the arguments appear to reflect a deliberate effort by the Justice Department to expand Executive powers.

A 2002 memorandum opinion from the Justice Department Office of Legal Counsel sets forth the arguments that the Government has deployed not only in the case at hand, but also in the other situations discussed above.[13] That opinion, like all such Office of Legal Counsel memorandum opinions, establishes official government policy. It states:

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[13] Memorandum from Sheldon Bradshaw, Deputy Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel to the Senior Associate Counsel to the President and National Security Council Legal Advisor, on "Constitutionality of the Rohrabacher Amendment" (July 25, 2001), *available at* www.tinyurl.com/rg9ae.

- "Despite the fact that Article II does not enumerate a Presidential power to interpret treaties, this function has been recognized";
- "[T]he President's foreign relations power includes a broad range of authority with respect to treaties. These include, *inter alia*, responsibility for treaty interpretation";
- "[T]he courts would be deciding a question of the utmost importance to the relations between [nations] * * *. To invite the courts to play such a role * * * is to disrupt the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs."

Id. at 6, 8 & nn.7, 8. Significantly, the memorandum opinion states that a specific law review article, John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851 (2001), provides the "basic premise of the analysis that follows." That article's arguments, not surprisingly, also parallel those in the case at hand:

- "[T]he treaty power is fundamentally executive in nature";
- "[T]he framing generation likely understood the treaty power as an exclusively executive power";
- "Presidents have broader powers of treaty interpretation than has been commonly understood";
- "Article II's Vesting Clause must refer to inherent executive . . . powers unenumerated elsewhere";
- "Senate's participation in treaty making and appointments merely indicates the dilution of the unitary nature of the executive branch, rather than the transformation of these functions into legislative powers."

Id. at 853, 854, 869.[14]

Clearly, the Government did not formulate its arguments to the Second Circuit merely for the present case. Rather, they are one facet of a larger Justice Department effort to expand Executive Branch power. The significance of the present case reverberates far beyond the immediate question of Government standing.

* * * *

The United States and England have together experienced the abuses of unbridled executive power. As Justice Jackson observed (see page 2, *supra*), King George went too far. The first grievance listed in the American Declaration of Independence criticizes sweeping Executive power, lamenting that the king "has refused his Assent to Laws, the most wholesome and necessary for the public good." This criticism rings too familiar today.

As a check on such overreaching, the Anglo-American legal tradition has always relied on judicial independence. Mr. Jefferson's epochal bill of complaints recognized this, criticizing that the king "has made Judges dependent on his Will alone" and has engaged in "abolishing the free System of English laws." This Court, like the Framers before it, should reaffirm the Judiciary's role.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14] See also John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1309–1310 (2002) (stating, *e.g.*, "[T]he treaty power * * * ought to be regarded as an exclusively executive power"; "Article II's Vesting Clause establishes a rule of construction that any unenumerated executive power, such as that over treaty interpretation, must be given to the President"; and that the President has a "monopoly over foreign affairs").

Respectfully submitted.

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